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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-424

BOWMAN TRANSPORTATION, INC.,
Petitioner,

vs.

HAROLD FRANKS, JOHNNIE LEE, and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, AND ITS LOCAL NO. 13600,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HAROLD FRANKS, JOHNNIE LEE, and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, AND ITS LOCAL NO. 13600,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case on June 3, 1974.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia is unreported and appears in Appendix B. The opinion of the Court of Appeals is reported at 495 F.2d 398 and appears in Appendix B. The judgment of the Court of Appeals dated June 3, 1974, its order dated July 15, 1974, denying petitioner's petition for rehearing,

and its order dated September 12, 1974, denying the petition of respondents Franks and Lee for rehearing, appear in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULE INVOLVED

The federal statutes involved are the Civil Rights Act of 1964, Title VII, §703(a), (c)(1) and (3) [42 U.S.C. §2000e-2(a), (c)(1) and (3)], §706(a), (e), (g) [42 U.S.C. §2000e-5(a), (e), (g)], before 1972 amendments; §703(a), (c)(1) and (3) [42 U.S.C. §2000e-2(a), (c)(1) and (3)], §706(a), (b), (e), (g) [42 U.S.C. §2000e-5(a), (b), (e), (g)], as amended by Pub. L. 92-261, §4, March 24, 1972, 86 Stat. 104; 42 U.S.C. §1981.

Also involved is Rule 23 of the Federal Rules of Civil Procedure.

Pertinent statutory provisions and Rule 23 are set forth in Appendix A.

QUESTIONS PRESENTED

1. Whether the District Court may award back pay to unnamed members of a class consisting of black employees and applicants for employment, where the class action alleging race discrimination in employment was brought and allowed under Rule 23(b)(2) of the Federal

Rules of Civil Procedure, and notice under Rule 23(c)(2) was not given to identifiable class members.

2. Whether in a class action alleging race discrimination in employment in violation of Title VII of the Civil Rights Act of 1964 and 42 United States Code §1981, the District Court may award back pay to class members consisting of employees and applicants, with respect to whom a charge has not been filed under Title VII with the Equal Employment Opportunity Commission.

STATEMENT

This class action was brought under Rule 23(b)(2) by a discharged black employee of petitioner trucking company's Atlanta, Georgia, terminal. Alleging race discrimination in his discharge, and generally against a class of black employees and applicants at the Atlanta terminal, the plaintiff sought affirmative relief for himself and declaratory and injunctive relief for the class. The intervening complainant, a discharged black road driver, also asserting a class claim under Rule 23(b)(2), likewise sought affirmative relief for himself to remedy his discharge and a prior failure of the company to grant his application for employment, and sought declaratory and injunctive relief for a class of black road drivers and applicants for road-driving positions over the company's entire system. The complainants relied on Title VII and 42 U.S. Code §1981.

At the trial the two complainants sought back pay for unnamed members of the class of black employees and applicants. There had been no arrangement for notice to these persons concerning the pendency of the class action, or concerning their rights to intervene and assert their claims or to exclude themselves from the action, and no such arrangement for notice was sought by the two class

representatives. The members of the class had not been named or otherwise described in a charge filed with the Equal Employment Opportunity Commission. They did not intervene in the proceedings below and assert claims for back pay.

The result was that, although findings were made by the District Court that the defendant company and defendant unions committed acts of race discrimination against the class, and declaratory and injunctive relief was granted, the court found that the elements of back-pay claims for the class members were not proved. The court determined that this remedy was not warranted in a class action under Rule 23(b)(2), and denied the remedy also in the exercise of discretion. On this subject the court stated (App. B, pp. A72-A73):

> The plaintiffs also pray for lump sum awards for back pay to any member of an affected class plus retroactive seniority to any rejected applicant. * * * Suffice it to say here, the court concludes that such relief is not warranted in class actions. The claims for back pay presuppose an opening, qualification and performance for every member of the class. The claims for retroactive seniority also presuppose a vacancy, qualification, and performance by every member. There is no evidence on which to base these multiple conclusions. More importantly, they bypass the statutory administrative prerequisites to personal suit established by the Congress and any appropriate statute of limitations. In essence, they seek to give individual compensation to the class in gross under circumstances where an individual could not qualify alone. The emphasis on private settlement in the Act is also thwarted by this device. * * * For these reasons as well as in the exercise of discretion, these

remedies are rejected. Of course, where appropriate they will be afforded the individual claimants here under 42 U.S.C. §2000e-5(g).

The Court of Appeals reversed the denial of back pay to unnamed class members, holding that the remedy was proper in a Rule 23(b)(2) class action based on race discrimination, and that prior submission of the claims of class members to the EEOC was not a precondition to this remedy. Deeming that the District Court had exercised its discretion under an erroneous view of the applicable law, the Court of Appeals remanded for reconsideration of the class back-pay issue.

The number of potential back-pay claimants in the affected class is suggested by the 197 unsuccessful applicants for road-driving positions named in the record as black, the 17 black employees in the tire department, and 18 black employees in the department of Atlanta city drivers and dock workers, at the time of trial.[1]

REASONS FOR GRANTING THE WRIT

This case presents questions of great public importance in the administration and enforcement of Title VII of the Civil Rights Act of 1964 and 42 U.S. Code §1981. The holding of the Court of Appeals means that a single complainant, through the device of a class action under Rule 23(b)(2) expressly seeking injunctive and declaratory relief for the class, can assert and litigate a large number of individual money claims of class members who have not been given notice of the action and have not sought to

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1. These figures are taken from defendant company's answers to plaintiffs' interrogatories, which were received in evidence by the District Court upon plaintiffs' motion.

intervene. The holding, if valid, thus arms an individual plaintiff with the power to assert and obtain an adjudication of numerous claims of other persons who are uninterested or even unwilling to participate in the case. This application of Rule 23 is diametrically opposed to the intended purpose of the rule. As applied below, the rule permits a large expansion of the scope of litigation through the adjudication of claims of persons not seeking to litigate. The pattern of Rule 23 shows that it is designed to reduce the scope of litigation by permitting the wholesale determination of claims which otherwise might have to be tried and determined individually. Where multiple individual claims are to be entertained, the rule itself contemplates that the action will be brought under Rule 23(b)(3) and notice under Rule 23(c)(2) must be given to members of the class. The ruling of the Court of Appeals permits two individual complainants, proceeding under Rule 23(b)(2), without resort to the procedures contemplated by Rule 23(b)(3) and (c)(2), to assert the individual claims of numerous class members.

This holding brings into play important questions of law and policy which should be decided by this Court. If Rule 23 is permitted to be thus used to expand the scope of litigation rather than to simplify it, the result will be an increasing burden upon the courts and the likely impairment or elimination of the class action as a useful device. Also, if an individual is permitted to proceed on such a wide front in asserting the claims of unconsenting persons, with the attendant increase of the scope of litigation arising under Title VII and 42 U.S. Code §1981, the almost certain result will be the impairment of the effective administration and enforcement of those statutes.

The decision of the Court of Appeals, in reversing the District Court's denial of back pay to unnamed class mem-

bers and holding that this remedy is available in a Rule 23(b)(2) class action, is inconsistent with the recent decision of this Court in *Eisen* v. *Carlisle & Jacquelin*, ... U.S. ....., 40 L.Ed.2d 732 (May 28, 1974), holding that the requirement under Rule 23(c)(2) of individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case, but is an unambiguous requirement of the rule. Although this Court was dealing with different facts in *Eisen*, the class action having been permitted under Rule 23(b)(3) and the decision relating directly to the necessity of the 23(c)(2) notice in such an action, the controlling considerations are applicable to this case. The result of *Eisen* cannot be obviated merely by use of a Rule 23(b)(2) label. The substance of the applicable principle is that where individual money claims qualify for class treatment, the action must be brought under Rule 23(b)(3) rather than 23(b)(2) and notice pursuant to 23(c)(2) must be given to class members.

The nature of the class claims in *Eisen* did not differ materially from the potential back-pay claims of present class members. In both instances there are individual claims for money, each involving separate elements of proof. It is equally important in either case that an individual claimant have the option provided under Rule 23 to refrain from participation in the class action and thus to elect not to be bound by the decision. The notice procedure is not less important, or less mandatory, because the class members have back-pay claims rather than claims for damages unrelated to employment.

The second question presented by this petition is also of great importance in the administration and enforcement

of Title VII and in the coordination of 42 U.S. Code §1981 with the procedural requirements of Title VII.

The holding of the Court of Appeals permits the District Court to entertain back-pay claims on behalf of employees who have not utilized the EEOC's administrative processes and on whose behalf no charge has been filed with the EEOC. This decision, if permitted to stand, defeats the Congressional purpose under Title VII of favoring conciliation over court enforcement. This purpose is supported by legislative history and is made clear by the pattern of the statute.

A provision of the House bill which would have allowed a civil action to be brought in advance of conciliation was deleted "to make certain that there will be a resort by the Commission to conciliatory efforts before it resorts to a court for enforcement." 110 Congressional Record 2566 (remarks by Representative Celler). In addition to the provisions concerning conciliation in Title VII, similar requirements appear in other parts of the Civil Rights Act of 1964. Title II, dealing with discrimination in public accommodations, states that after a civil action has been brought the court may refer the matter to the Community Relations Service as long as the court believes there is a reasonable possibility of obtaining voluntary compliance. 42 U.S.C. §2000a-3(d). Title IV concerning the desegregation of public education precludes the attorney general from filing suit until the school board has had a reasonable time to correct any discriminatory practice. 42 U.S.C. §2000c-6. Title VI, affecting discrimination in federally assisted programs, prohibits discontinuation of federal funding until it is determined that discriminatory practices cannot be terminated by voluntary means. 42 U.S.C. §2000d-1. Title X establishes a Community Relations Ser-

vice to assist in resolving disputes by conference and conciliation. 42 U.S.C. §2000g-1.

The District Court correctly noted that the allowance of back pay to employees whose claims had not been submitted to the EEOC would bypass the statutory administrative prerequisites to personal suit, appropriate statutes of limitations, and the emphasis on private settlement. The principle adopted by the Court of Appeals, if valid, means that the Congressional purpose of promoting adjustment of employment discrimination cases through the conciliation procedures of the Commission will be effectively nullified, and there will be no incentive for individual employees to utilize these procedures so long as another member of the class has done so.

If these individual claims must be submitted to the EEOC before their assertion in court under Title VII, as petitioner contends, the same requirement attaches as a precondition to the maintenance of an action for race discrimination under 42 U.S.C. §1981. The principle established by this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and related cases, requires this result. Just as the administrative procedure under the National Labor Relations Act is preemptive of other means of enforcement, the statutory machinery required under Title VII likewise preempts other means of remedying race discrimination in employment. Obviously the statutory purpose of Title VII to promote conciliation of race discrimination claims under auspices of the EEOC would be nullified if the complainant could go directly to court and present the same claims under another statute.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

Civil Rights Act of 1964, Title VII

(before 1972 amendments)

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

* * *

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

Sec. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * *

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain

voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

* * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a

member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

* * *

Civil Rights Act of 1964, Title VII (as amended by Pub. L. 92-261, §4, March 24, 1972, 86 Stat. 104)

§703 (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

* * *

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

§706 (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines

after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice

that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * *

42 U.S. Code §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Federal Rules of Civil Procedure
Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially As Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be con-

ditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make

appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX B

Harold FRANKS, Plaintiff-Appellant,

Johnny Lee, Intervenor-Appellant,

v.

BOWMAN TRANSPORTATION COMPANY et al., Defendants-Appellees.

No. 72–3239.

United States Court of Appeals, Fifth Circuit.

June 3, 1974.

A former employee of a trucking company brought an action against his former employer on behalf of himself and others similarly situated alleging discriminatory refusal to promote, discriminatory discharge and other racial discrimination in employment. After another former employee of the same employer had been permitted to intervene with similar charges, the United States District Court for the Northern District of Georgia, at Atlanta, Sidney O. Smith, Jr., J., found that plaintiff's suit had been barred by limitations and that the intervening plaintiff had failed to prove his charge of discriminatory discharge, but also found that the intervening plaintiff had proved his claim for discriminatory refusal to hire and that a pattern of past racial discrimination by the employer against its black employees had been shown. On appeal by both plaintiff and intervenor, the Court of Appeals, Thornberry, Circuit Judge, held, inter alia, that the 30-day period within which plaintiff was required to bring his suit under the Civil Rights Act of 1964 began to run only when he actually received his "suit letter" from the EEOC; that the statutes of limitations applying to plaintiff's action for back wages and for denial of his civil rights under the Civil Rights

Act of 1866 were tolled both during the pendency of the EEOC complaint and thereafter until plaintiff actually received his "suit letter"; that evidence supported the trial court's determination that the intervenor had not proved that his discharge was racially motivated; and that the class and subclasses represented in the action were entitled to further affirmative relief than was afforded by the district court's decree.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Civil Rights ⇐40

When first "suit letter" from EEOC to employee was delivered by certified mail, return receipt requested, to employee's nine-year-old nephew, but thereafter lost by nephew before being delivered to employee, and employee's action against employer under Civil Rights Act of 1964 was not initiated until over one year later, but within 30 days after employee received second "suit letter" from EEOC, action was timely since mailing of initial letter did not constitute constructive receipt by employee and did not effectively "notify" employee of right to bring suit within meaning of Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e–5(e); Equal Opportunity Act of 1972, § 14, 42 U.S.C.A. § 2000e–5 note.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇐40

While, as evidentiary matter, district court may properly consider mailing of "suit letter" and receipt showing proper delivery as prima facie evidence that notice has reached addressee, nevertheless where it is shown that claimant, through no fault of his own, has failed to receive "suit letter," delivery of letter to mailing address cannot be considered to constitute statutory notification. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A.

§ 2000e–5(e); Equal Opportunity Act of 1972, § 14, 42 U.S. C.A. § 2000e–5 note.

3. Courts ⇐375(3)

When action is brought for back pay or similar damages under federal statute which contains no built-in limitations period, federal district court must apply statute of limitations of state where it sits which would be applicable to most closely analogous state action. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐40

Statutes of limitations pertaining to employees' claims under Civil Rights Acts of 1866 and 1964 for back wages due because of alleged racially discriminatory employment practices were tolled by filing of complaint with EEOC and remained tolled during such time as processes of agency reconciliation were at work and until employee received copy of second "suit letter," first "suit letter" having been lost by employee's nephew before being delivered to him. 42 U.S. C.A. § 1981; Civil Rights Act of 1964, §§ 701 et seq., 706(e), 707 as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–5, 2000e–6(e); Code Ga. § 3–704.

5. Civil Rights ⇐13.10, 40

Actions and relief authorized by Civil Rights Act of 1866 and Title VII of Civil Rights Act of 1964, including right to award of back pay, are essentially equitable in nature and therefore subject to applicability of doctrine of laches. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, §§ 701 et seq., 706(g) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–5(g).

6. Civil Rights ⇐40

When issue of tardy filing of complaint of employment discrimination under Civil Rights Act of 1964 was brought sufficiently to attention of trial court to be ground for its ruling, issue of possible laches on part of complainant was

adequately raised. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐44(1)

Although facts surrounding discovery of "stinger" in fuel pump of truck driven by employee of trucking company left ample room for suspicion that fuel pump had been altered by another employee, evidence supported trial court's finding that employee's dismissal by employer, ostensibly because employee breached employer's regulations by tampering with fuel pump, was not racially motivated. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e–5.

8. Civil Rights ⇐38

Federal court is final arbiter in cases involving Title VII of Civil Rights Act of 1964, and arbitrator's determination under labor contract has no effect upon court's power to adjudicate violation of employment rights under that Act. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐39
Labor Relations ⇐465

Invoking contractual grievance procedures does not constitute election of remedies which automatically bars claimant under employment discrimination provisions of Civil Rights Act of 1964 from court, and arbitration award cannot be pleaded as defense to such claim under doctrine of res judicata. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

10. Civil Rights ⇐43

Arbitration awards and grievance determinations may be properly considered as evidence in suit brought under federal statutes prohibiting racial discrimination in employment to extent they are relevant to questions before court, and court has discretion under certain circumstances to defer to arbitra-

tor's determinations. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

11. Labor Relations ⇐465

In action under Title VII of Civil Rights Act of 1964 for alleged racial employment discrimination, district court was not bound by arbitrator's decision that employee had been discharged by employer because he tampered with fuel pump rather than for racial reasons, since contractual right not to be dismissed unless cause could be demonstrated was not identical to right not to be discharged for reasons of race and arbitrator's finding could be of little, if any, evidentiary value on issue whether firing was discriminatorily motivated. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

12. Civil Rights ⇐46

Limits of district court's discretion in framing remedies in action under Title VII of Civil Rights Act of 1964 are marked by its duty to carry out within practicable limits purpose of Act, which is to make discriminatee whole and to remedy effects of past discrimination. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

13. Civil Rights ⇐9.12

When departmental seniority system perpetuates effect of past discrimination, it is unlawful employment practice proscribed and remediable under statutes prohibiting racial employment discrimination. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

14. Civil Rights ⇐9.12

That departmental seniority system is racially neutral on its face does not save it from constituting discrimination in employment if its effect is to cut into employees' present rignt not to be discriminated against on ground of race. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

15. Civil Rights ⇐46

Federal courts' power to modify or suspend operation of discriminatory seniority system is not affected by fact that seniority system has been established in private collective bargaining agreement. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⇐9.12

Only ground upon which discrimination-perpetuating seniority system may be defended is that of business necessity. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ⇐46

In view of manner in which trucking company's racially discriminatory departmental seniority system locked employees into old racial patterns, remedy afforded by district court in action under Title VII of Civil Rights Act of 1964 should have allowed employees the use of full company seniority for transfer purposes for reasonable time and for all purposes after transfer in new department. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

18. Civil Rights ⇐46

Even though black applicants for positions as over-the-road truck drivers suffered wrong when they were rejected on racial grounds, court had no power, in suit for discrimination in employment, to grant applicants constructive company seniority as of date of applications as remedy for such wrongs. Civil Rights Act of 1964, §§ 701 et seq., 703(h) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

19. Civil Rights ⇐46

In view of findings that employer, a trucking company, although aware of its legal obligations not to discriminate on basis of race, intentionally continued to follow its discriminatory policy until threatened with litigation, and in view of finding that employer had never hired any black office workers, but had relied on word-of-mouth advertising to fill vacan-

cies which became available, employer's black employees, as class, were entitled to relief in form of requirement of public recruitment aimed at potential black drivers and clerical employees. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

20. Civil Rights ⇐46
Courts ⇐406.9(10)

Where trucking company had unlawfully engaged in racial discrimination in employment by affording to white employees training opportunities which were not made available to blacks, minimum effective remedy would be to allow black applicants and new employees access to training opportunities on equal basis with whites, and trial court would be instructed on remand to inquire as to whether temporary measures to insure access to training opportunities for discriminatees would be appropriate. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

21. Civil Rights ⇐46

Where employer maintained blatantly discriminatory policies for over five years after passage of Civil Rights Act of 1964 and had since that time moved toward complying with Act's mandates only under pressure from government agencies and in face of threatened litigation, district court should retain jurisdiction in employment discrimination case against employer for at least two years, and require periodic reports from employer which would enable court to ascertain that remedial measures mandated by it were being carried into effect. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

22. Civil Rights ⇐46

Neither letter nor spirit of Title VII of Civil Rights Act of 1964 nor federal rule dealing with class actions prohibited back pay awards to nonnamed class members in class action brought under Act for racially discriminatory employment practices. Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.;

42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e–5(k).

Appeal from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

THORNBERRY, Circuit Judge:

After processing a complaint through the EEOC, appellant Franks brought this racial-discrimination civil rights suit under Title VII, § 706, of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e–5, and under 42 U.S.C.A. § 1981 on behalf of himself and those similarly situated against his former employer, Bowman Transportation Company, and his union.[1] He alleged a discriminatory refusal to promote and a discriminatory discharge, and he sought extensive declaratory and equitable relief for himself and for class members. Lee was permitted to intervene as plaintiff to press his individual claim against Bowman for a discriminatory refusal to hire and for a discriminatory discharge and to represent other classes of black Bowman employees and job applicants. The district court found after a three-day trial that Franks had established the factual bases for his individual claim, but it dismissed his individual action because it concluded Franks had waited beyond the applicable limitations period to file suit. The court held that Lee factually established his claim for a discriminatory refusal to hire, but failed to prove his claim for discriminatory discharge, and it accordingly entered judgment partly for him and partly against him. As to the classes represented, the court found that past racial discrimination had been demonstrated and that the departmental seniority

1. International Union of District 50, Local No. 13600, Allied and Technical Workers of the United States and Canada. Also included as a party defendant was the national union of which Local 13600 is a part, International Union of Allied and Technical Workers of the United States and Canada.

system maintained by Bowman and the union perpetuated the effects of past discrimination. As a remedy, the court enjoined Bowman from discriminating along racial lines in the future, ordered that certain class members be allowed to utilize company seniority accumulated before the date on which discrimination had ceased, and afforded certain discriminatees who responded to a notice from Bowman within thirty days priority in consideration for employment. The court declined to grant further affirmative relief requested, including the use of full company seniority for certain discriminatees, measures to ensure hiring and training of greater numbers of blacks in the future, and a requirement that Bowman file periodic reports with the district court to demonstrate compliance.

On this appeal we are asked to review the district court's adverse rulings on the individual claims of Franks and Lee and to determine whether the district court abused its discretion in not affording greater affirmative relief to the classes they represented. We shall discuss the pertinent facts in connection with the various claims.

I. Franks' Individual Claim: Limitations and Laches

Bowman is an interstate trucking company which operates as a common carrier licensed by the Interstate Commerce Commission throughout southeastern United States and in parts of the mid-west.[2] Its principal terminals are in Atlanta, Birmingham, Charlotte, and Richmond.

Franks, a Negro, was first hired at Bowman's Atlanta terminal in 1960 as a "tire man,"—a position which requires the most menial work at the terminal and brings the lowest pay. Except for a one-year period in 1961 and 1962 during which he was assigned as a "grease man," Franks worked as a tire man continuously until 1965, when he resigned due to an

2. Bowman's operations and procedures are described more fully at the beginning of part III of this opinion, *infra*.

injury. In 1966 he was rehired as a tire man. After his return Franks attempted on several occasions to obtain a transfer, or promotion, into another job, but his way was blocked by Bowman's racially discriminatory policy of employing blacks only in the Tire Shop.[3] Although Bowman agreed in a collective bargaining agreement signed in 1967 to allow transfers and to hire without regard to race, the discriminatory policy was in fact continued in effect unofficially after 1967. Both before and after 1967 Franks was told that blacks could not transfer, or be promoted, from the Tire Shop. The district court found that but for Bowman's discriminatory policy, Franks should reasonably have been promoted to a higher paying, "dock worker" position by the end of 1967. No challenge is made to this finding.

Having watched white workers hired "off the street" into higher paying positions for which he was qualified and had applied, Franks filed a complaint with the Equal Employment Opportunity Commission on March 25, 1968, charging that Bowman refused to promote him because of its racially discriminatory policy of employing blacks only in the Tire Shop. EEOC officials visited the Atlanta terminal on two occasions, on April 23, 1968 and on May 10, 1968 to investigate Franks' charges. A few hours after the second visit Bowman discharged Franks, assertedly for "unauthorized bobtailing," or using company vehicles for personal errands. The district court rejected this purported explanation, however, and found that Franks was discharged "for reasons of race." On May 13, 1968 Franks filed a second complaint with the EEOC, alleging a discriminatory discharge.

Efforts to resolve the dispute through conciliation having failed, on March 21, 1969 Franks' then attorney requested the EEOC to issue a § 706(e) "suit letter" covering both complaints, and such a letter was sent on the same day to Franks' mailing address by certified mail, return receipt requested.

3. Two blacks who worked as "cleanup men" in the Trailer Shop were exceptions.

Franks resided at 5339 Victory Drive in Morrow, Georgia, but he received his mail at 5319 Victory Drive, where his grandmother, sister, and nine-year-old nephew resided. On March 22 his nephew received the letter and signed the postal receipt, but he lost the letter before delivering it to Franks. Franks learned that his nephew had signed for some letter, but he never saw or received the letter personally. About a year later, on March 20, 1970 Franks contacted EEOC officials again about his dispute with Bowman, and, upon being shown the postal receipt for the first suit letter, affirmed in an affidavit that he had not personally received it. Franks then retained his present attorneys and filed "amended" charges with the EEOC which substantially duplicated the earlier charges. A second suit letter issued on April 14, 1971, and Franks filed a suit less than a month later on May 5, 1971.

On these facts the district court held Franks' Title VII and his Section 1981 claim barred. As to the Title VII action, the court reasoned that the thirty-day statutory limitations period [4] began to run on March 22, 1969, the date the first suit letter was delivered to Franks' mailing address, so that the action was barred after April 21, 1969. As to the § 1981 action, the court concluded that a two-year Georgia statute of limitations was applicable and that it barred the claim since the suit had not been filed for almost three years after Franks' discharge on May 10, 1968.

[1] The statutory language which established the thirty-day limitations period applicable to Franks' Title VII action is found in § 706(e) as it read before the 1972 amendments: [5]

> If within thirty days after a charge is filed with the Commission [or within sixty days, if the Commission acts to extend the period] the Commission has been unable to obtain voluntary compliance with this subchapter, the Com-

4. The 1972 amendments to the Civil Rights Act of 1964, P.L. 92-261 § 14, 86 Stat. 113, extended the limitations period from thirty days to ninety days.

5. *See* note 4 *supra*.

> mission shall so notify the person aggrieved and a civil action may, within thirty days thereafter be brought against the respondent named in the charge (1) by the person claiming to be aggrieved. . . .

The key word in the statute is "notify"; the limitations period begins to run upon notification of the aggrieved party.[6] This Court has held that such notification takes place only when "notice of the failure to obtain voluntary compliance has been sent *and received.*" Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283 (emphasis added). There being no question that the EEOC mailed the statutory notice to Franks, the Title VII limitations issue must be framed in terms of whether Franks constructively "received" the letter, even though it never actually came into his hands. We hold that Franks did not "receive" the first suit letter, and that the thirty-day limitations period began to run only when the second suit letter actually reached him or his attorney. Genovese v. Shell Oil Co., 5th Cir. 1973, 488 F.2d 84. Since suit was filed within thirty days of the receipt of the second suit letter, the Title VII action was not barred by the § 706(e) limitations period.

We do not deal here with service of process or receipt of an offer or acceptance to make a contract, but with the interpretation of Title VII. The courts have consistently construed the Act liberally to effectuate its remedial purpose, and we think this purpose would be poorly served by the application of a "constructive receipt" doctrine to the notification procedure. More narrowly, the purpose of the statutory notification, which is "to provide a formal notification to the claimant that his administrative remedies with the Commission have

6. The statute does not establish an aggregate ninety-day limitations period (*i. e.*, the aggregate of the maximum sixty-day conciliation period and the thirty-day right-to-sue period) which begins to run on the date the charge is filed. Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283. The statute does not specify any certain limit on the time which may pass between the expiration of the conciliation period and the statutory notification, which starts the thirty-day period. *See id.*; *see also* 29 C.F.R. § 1601.25a.

been exhausted," Beverly v. Lone Star Lead Construction Corp., 5th Cir. 1971, 437 F.2d 1136, and to inform him that the thirty-day period has begun to run, has not been accomplished unless the claimant is actually aware of the suit letter. In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights if he allows the thirty-day period to expire in ignorance of his right to sue.

Our holding that the statutory notification is complete only upon actual receipt of the suit letter accords with the view we have expressed in prior cases that Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute. Thus, in Beverly v. Lone Star Lead Construction Corp., supra, we concluded that the EEOC's failure to find reasonable cause to suspect a Title VII violation was not a jurisdictional barrier to a claimant's Title VII suit because Congress did not intend to make a claimant's statutory right to sue subject to "such fortuitous variables as workload, mistakes, or possible lack of diligence of EEOC personnel." *Id.* at 1140. Similarly, in Dent v. St. Louis-San Francisco Railway Co., 5th Cir. 1969, 406 F.2d 399, we held that the EEOC's failure to attempt to effect voluntary conciliation did not bar a Title VII suit because a claimant's right to sue was not dependent on acts or omissions of the EEOC which were "beyond the control of the aggrieved party." *Id.* at 403. In this case we are not confronted with any delay or mistake on the part of the EEOC, but with the loss of the first suit letter by Franks' nine-year-old nephew. This loss must be characterized as a fortuitous event, however, just as loss of the letter in the EEOC office before mailing or loss by the postal department would have been.

[2] As an evidentiary matter, a district court might properly consider the mailing of a suit letter and the receipt showing proper delivery as prima facie evidence that the notice had reached the addressee. Where, however, it is

shown that the claimant through no fault of his own has failed to receive the suit letter, and the district court has so found, as in this case, the delivery of the letter to the mailing address cannot be considered to constitute statutory notification.

[3] Our conclusion that Franks' Title VII is not barred does not end the matter, for special limitations considerations apply to that aspect of the Title VII action which seeks back pay. First, the proper limitations statute must be selected and applied. Under the borrowing principle of Beard v. Stephens, 5th Cir. 1967, 372 F.2d 685, when an action is brought for back pay or similar damages under a federal statute which contains no built-in limitations period, the federal district court must apply the statute of limitations of the state where it sits which would be applicable to the most closely analogous state action. The instant case was brought in a Georgia federal court. We have held in a recent case that the Georgia statute governing a back pay award in a § 707 pattern or practice suit brought by the Attorney General or in a § 706 private action such as the instant one, is Ga.Code § 3–704,[7] which prescribes a two-year limitations period for actions to recover wages, overtime, and damages due under statutes respecting the payment of wages. United States v. Georgia Power Company, 5th Cir. 1973, 474 F.2d 906, 924. Under the Georgia Power case, then, it is clear that the two-year statute applies.

[4] For Franks' individual claim the statute began running on the date of his dismissal May 10, 1968. The running of the limitations period was tolled by the filing of a complaint with

7. Section 3–704 reads in pertinent part:
All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within 20 years after the right of action shall have accrued: Provided, however, that all suits . . . for the recovery of . . . wages and overtime, subsequent to March 20, 1943, shall be brought within two years after the right of action shall have accrued.

the EEOC on May 13, 1968, three days later, and it remained tolled "during such time as the processes of agency reconciliation are at work and until notification to the complainant that voluntary compliance cannot be obtained." United States v. Georgia Power Co., *supra* at 925. As we have indicated above, the notification was not ultimately made until the second suit letter was received on April 14, 1971. On this date the limitations period began running again and continued to run for twenty-one days, until suit was filed on May 5, 1971. Thus the limitations period ran for a total of less than one month, far less than the two year limitations period, before the suit was filed.

Under the same borrowing principle of Beard v. Stephens, *supra*, we conclude that Ga.Code § 3–704 applies to Franks' action under § 1981. The first sentence of that section providing a twenty-year period for "all suits for the enforcement of rights accruing to individuals under statutes . . . ", plainly did not bar Franks' § 1981 action. The proviso of the § 3–704 prescribing a two-year period for suits to recover wages applies to the § 1981 action in the same way as to the Title VII action. The running of the limitations period was tolled during the period between the filing of the May 13, 1968 complaint with the EEOC and the receipt of the second suit letter on about April 14, 1971.

[5] One further matter relating to the time suit was filed remains to be considered, and that is the applicability of the doctrine of laches. Title VII empowers the federal district court to

> enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay. . . .

§ 706(g), 42 U.S.C.A. § 2000e–5(g). Thus, the action and the relief authorized are essentially equitable in nature. This is

true not only of traditional injunctive relief which may be granted, but also of the back pay award.

> The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.

Johnson v. Georgia Highway Express, Inc., 5th Cir. 1969, 417 F.2d 1122. The § 1981 action, insofar as it corresponds to the Title VII action, must also be considered essentially equitable. In an equitable action, equitable defenses may be raised, and these include the doctrine of laches. In the proper case, laches might be applied to bar a claim entirely, or it might bar only part of the remedy sought, such as the back pay award or a portion of it. *See* United States v. Georgia Power Co., *supra* at 923. We do not intimate any view as to the applicability of laches to this case, for the district court should make such a determination in the first instance.

[6] Our holding that Franks' individual claim was not barred by limitations necessitates reversal of that portion of the district court's judgment dismissing it. Since the question of Franks' tardiness in initiating suit was called to the attention of the district court, on remand it should specifically consider the applicability of laches.[8] Subject to its determination as to the applicability of the doctrine of laches, the district court should enter judgment for Franks and fashion an appropriate remedy, since it has already found that he established the factual bases of his claim.

II. Lee's Individual Claim: Significance of Arbitration Award

Lee, a Negro with seven years' experience as a truck driver and an excellent driving record, originally applied to Bowman

8. Appellants contend that the issue was not adequately raised below. When the issue of tardy filing was brought sufficiently to the attention of the court to be the ground for its ruling, however, we think it must be considered to have been adequately raised.

for a driving job in January of 1970, but he was not hired, the district court found, because of his race. Upon learning that a white driver had been hired shortly after his rejection, Lee filed a complaint with the EEOC on February 26, 1970, charging a racially discriminatory refusal to hire. In response to the charge and to pressure from the Office of Federal Contract Compliance, Lee was hired on September 18, 1970 at the Birmingham terminal as one of Bowman's first black over-the-road truck drivers.

After working as a model employee for several months, Lee was discharged on March 18, 1971. The facts surrounding his discharge have been in dispute throughout this litigation. When Lee brought his truck to the Bowman garage which serves the Birmingham area, a "stinger" was found in the fuel pump of his engine. A stinger is a wooden peg used to override the engine's governor, the device which limits the maximum revolutions per minute and thereby the truck's maximum speed. Bowman claims that it discharged Lee because of the stinger in his truck's engine under a firm, long-standing company policy requiring discharge of any employee whose fuel pump has been altered. Lee denies any fuel pump tampering and stresses the opportunities of others, including Bowman's white mechanics, to plant the stinger for reasons of racial prejudice.

Lee's discharge was submitted to binding arbitration under contractual grievance procedures and on October 25, 1971 an award favorable to Lee resulted. The arbitrator found that although the "facts raise[d] a strong inference approaching a presumption in the Company's favor," there was a "failure of proof" because the possibility of fuel pump tampering by other employees was not adequately eliminated. Reinstatement and back pay for one month, the maximum allowable under the collective bargaining agreement, were ordered. Bowman sent the back pay to Lee, and tendered reinstatement in his old Birmingham-based job on October 29, 1971. Lee refused to accept reinstatement at Birmingham, however,

and demanded a transfer to Atlanta and back pay for all months from the time of his discharge. Bowman refused to comply with these demands, and the district court found that this refusal was not racially motivated.

Independently of the grievance procedures under the collective bargaining agreement Lee filed a second complaint with the EEOC on March 19, 1971, charging a discriminatory discharge. Lee's first EEOC charge, it will be recalled, was for the discriminatory refusal to hire. On June 22, 1971, Lee received a suit letter authorizing a Title VII action because of the discriminatory refusal to hire, and on July 12, 1971, he received another suit letter with respect to the alleged discriminatory discharge. He filed a timely motion to intervene in Franks' suit and was subsequently permitted to intervene on behalf of himself individually and other similarly situated black Bowman employees and job applicants. Lee's complaint invoked the court's jurisdiction under both Title VII and § 1981, as did Franks' original complaint.

The district court found for Lee with regard to the original refusal to hire and awarded him a total of $6,124.58 in back pay. No appeal is taken from this part of the district court's judgment.

[7] In view of the undisputed fact that a stinger was found in Lee's truck and in light of Bowman's mandatory discharge policy for fuel pump tampering, the district court found that Lee failed to prove his discharge was racially motivated. On the basis of the evidence before it, it determined:

> The mandatory discharge rule for alteration of the fuel pump is one of long-standing. Between 1967 and trial, there were some 30 terminations or permitted resignations for violation of this rule. Some of the discharged drivers had received prior warnings for violations or other company rules not leading to mandatory discharge; but some, like Lee, had no prior warnings and possessed clean records at the time. There was no requisite of previous offense to the

discharge. Most significantly, there is no indication and no evidence that any other driver, Black or white was ever NOT discharged for violation of the standing rule. It is concluded that race was not a factor in the discharge of the intervenor Lee.

Appellant Lee challenges as clearly erroneous the district court's finding that the discharge was not racially discriminatory. Although the facts surrounding the discovery of the stinger leave ample room for suspicion that the fuel pump was altered by another employee besides Lee, on the record before us we cannot hold the district court's determination clearly erroneous.

[8, 9] The primary basis for Lee's factual attack is his contention that the district court erred in failing to give greater weight to the arbitration award in his favor in making its findings.[9] We cannot agree. The federal court is the final arbiter in cases involving Title VII rights, and "the arbitrator's determination under the contract has no effect on the court's *power* to adjudicate a violation of Title VII rights." Hutchings v. United States Industries, Inc., 5th Cir. 1970, 428 F.2d 303, 313 (emphasis in original). Invoking contractual grievance procedures does not constitute an election of remedies which automatically bars a Title VII claimant from the court, and an arbitration award cannot be pleaded as a defense to a Title VII suit under the doctrine of res judicata. *See id.* at 314; Rios v. Reynolds Metals Co., 5th Cir. 1972, 467 F.2d 54; Bowe v. Colgate-Palmolive Company, 7th Cir. 1969, 416 F.2d 711, 715.

[10] To be sure, arbitration awards and grievance determinations "may be properly considered as evidence" in a Title VII case to the extent they are relevant to the questions before the court. Hutchings v. United States Industries, Inc., *supra* at 314 n. 10. And when the same issues are presented

9. The district court concluded: "The court is not bound by the arbitration award in any way. . . . This is especially true where race was given no consideration by the arbitrator."

in arbitration as in a Title VII lawsuit, the court has discretion under certain circumstances to defer to the award, just as the National Labor Relations Board may in a case properly before it defer to an arbitrator's determinations. *See* Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 5th Cir. 1958, 257 F.2d 467, 473. We have recently had occasion to delineate in some detail the circumstances under which such discretionary deference by a court is proper:

> We hold that the federal district court in the exercise of its power as the final arbiter under Title VII may follow a like procedure of deferral [i. e., a procedure like that of the NLRB] under the following limitations. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective bargaining agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities.

Rios v. Reynolds Metal Company, *supra* at 58.

[11] In this case it is clear that complete deference to the arbitration award would have been improper. The contractual issue presented to the arbitrator was whether the company proved, under a "strict proof" standard, that Lee had tampered with the fuel pump, and not whether the discharge was for racial reasons. The contractual right not to be dismissed unless "cause" could be demonstrated was not identical to the Title VII not to be discharged for reasons of race. Further,

the arbitrator's finding could be of little if any evidentiary value. A finding that the stinger in the fuel pump was not Bowman's real reason for discharging Lee would have had an important bearing on the question of racial motivation presented to the court, but the arbitrator made no such finding. Rather, the arbitrator found only that the company failed to prove fuel pump tampering, and did not deal with Bowman's motivation. In arriving at this finding, the arbitrator imposed on the company the burden of proof, and it evaluated the evidence under a "strict" standard of proof, under which "reasonable doubts should be resolved in favor of the grievance." Thus, in the final analysis, the arbitrator determined only that the company's asserted basis for the discharge—that Lee had tampered with the fuel pump—was not demonstrated beyond a reasonable doubt. This finding could be of little value to Lee in carrying his burden of proving racial motivation at trial or to the district court in resolving the factual issues before it. It did not err or abuse its discretion in failing to give greater weight to the arbitration award.

Accordingly, the judgment of the district court insofar as it relates to Lee's individual claim is affirmed.

III. Adequacy of Relief to the Class

Appellants argue that the record in this case calls for further affirmative relief to the class of discriminatees, beyond that granted in the injunction of the district court. Specifically, they seek (1) allowance of full company seniority for employees who have been discriminated against, (2) the temporary use of a mathematical formula to ensure the hiring of more black over-the-road drivers in the future and the ordering of public recruitment for black over-the-road drivers and for black office workers, (3) mandatory training programs to upgrade the skills of black employees and applicants, and (4) retention of jurisdiction by the district court to ensure compliance. Additionally, appellants contend the district

court abused its discretion in refusing to award back pay to non-named class members. We are compelled to agree that further relief in some respects is required, as we indicate below.

A. Bowman's Operations and Policies

Bowman is an interstate trucking business with its main terminals located in Atlanta, Birmingham, Charlotte, and Richmond. Its employees fall into four categories: (1) the over-the-road (OTR) drivers, (2) city drivers and dock workers, (3) Maintenance Department workers (including employees in the Tractor Shop, the Trailer Shop, and the Tire Shop), and (4) office, sales, and clerical employees. Employees in the first three categories belong to the union, and the organizational lines separating them are established in the collective bargaining agreements between Bowman and the union. The office and clerical employees are not unionized, but, the district court found, "in essence [they] constitute another department at each terminal." The OTR drivers are the long-distance truck drivers; they number four hundred to five hundred company-wide, and they earn the highest wage paid to non-management employees. The city drivers, of whom about fifty are employed at the Atlanta terminal, drive trucks on local missions at the respective terminals, and the one hundred fifty to two hundred dock workers perform the manual labor of loading and unloading trucks. The city drivers and dock workers are at the middle of the wage scale. Within the Maintenance Department, which has about one hundred twenty employees in Atlanta, the jobs in the Tire Shop require the most menial work and bring the lowest pay, while the Tractor Shop and the Trailer Shop jobs require mechanical skill and pay more. Each terminal is a hiring center for OTR drivers, who operate system-wide, as well as for other categories of employees, whose work is localized at the terminal. In its class aspects, this suit involves all OTR drivers throughout

Bowman's system, and employees in the other three categories at the Atlanta terminal only.

Before 1968 Bowman followed a conscious policy of keeping its employees segregated according to race. With the exception of two black "cleanup men" in the Trailer Shop, blacks were employed only in the Tire Shop.[10] This was the only

10. The district court found that the following chart represented accurately the distribution of jobs according to race at the times indicated:

Dept./Job	July, 1965 Blacks	July, 1965 Whites	March, 1968 Blacks	March, 1968 Whites	August, 1971 Blacks	August, 1971 Whites
Office & Managerial	0	23	0	27	0	42
Sales Personnel	0	6	0	5	0	5
Office/Clerical	0	27	0	63	0	53
Ship Parts Clerk	0	8	0	9	0	9
Over-the-Road Drivers						
Atlanta Terminal	0	360	0	361	0	230
All Other	0	55	0	103	11	269
TOTAL	0	415	0	464	11	499
City Driver/ Dock Jobs						
City Drivers	0	79	0	80	3	81
Checkers	0	23	0	127	4	103
Dock Workers	0	84	0	94	6	60
TOTAL	0	186	0	301	13	244
Shop Workers						
Mechanics	0	70	0	92	0	63
Trailer Shop	-	-	-	-	0	36
Grease/Oil Men	0	6	0	8	0	4
Tire Shop	7	1	9	3	16	2
Clean-up Men	-	-	1	1	4	0
Janitors	0	1	0	2	1	1
TOTAL	7	78	10	106	21	106
TOTAL EMPLOYEES	7	743	10	1025	45	958

subdivision into which blacks were hired, and transfer to other shops within the Maintenance Department or to other departments was not permitted. The Tire Shop had predominantly black employees and white supervisors. Since August 1968 Bowman has hired a few blacks into the previously all-white OTR and City Driver and Dock Departments, but as of the time of trial in March of 1972 it had not hired any blacks into the higher paying mechanic jobs in the Maintenance Department or as office or clerical workers.

Before 1967 Bowman prohibited interdepartmental transfers flatly. The collective bargaining signed in 1967 eliminated Bowman's no-transfer policy and opened the way for nonracial hiring in all departments, but the agreement continued to recognize departmental seniority. The district court found that the maintenance of the departmental seniority "effectively penalized any Senior Blacks wishing to transfer to a previously all-white department in favor of junior whites already employed there."

The first black was hired into the previously all-white City Driver and Dock Department on August 15, 1968.

Despite the collective bargaining agreement provision mandating hiring without regard to race, Bowman maintained until September of 1970 a conscious unwritten policy of not hiring blacks as OTR drivers. The apparent source of the resistance to change in this department was the unwillingness of the white drivers to "ride double" with blacks to train them for the job or to share bunk and shower facilities with them on the road. In 1970 the company began receiving greater numbers of applications from blacks for OTR jobs. Under pressure from the Office of Federal Contracts Compliance to hire OTR drivers without regard to race, and partly in response to the EEOC charge filed by appellant Lee, Bowman hired its first OTR driver on September 11, 1970. For about a year black OTR drivers were hired only at the Birmingham terminal, where Bowman housed them in separate facilities.

Other black OTR drivers were first hired in Richmond on September 12, 1971, in Atlanta on November 21, 1971, and in Charlotte on February 15, 1972. The record reflects that Bowman has been hiring black OTR drivers at a sharply decreasing rate since the first hirings in September of 1970 under pressure. During the last four months of 1970, ten of the thirty-six new OTR drivers hired, or 28%, were black. During the twelve months of 1971, thirteen of one hundred one, or 12%, of the new OTR drivers were black. In the first two months of 1972, immediately before trial, Bowman hired fifty OTR drivers, only four of whom, or 8%, were black. On February 26, 1972, one month before trial 3.3% of the total number of OTR drivers employed by Bowman were black."

The provision of the 1967 collective bargaining agreement abolishing the no-transfer rule and requiring hiring without regard to race has had no effect in the Maintenance Department. Bowman has never hired a black mechanic in the Tractor Shop or in the Trailer Shop, either "off the street" or as a transfer from the Tire Shop. Bowman has not hired a black as a "grease man" since that position became a training step to the mechanic positions. When blacks have attempted to transfer from the Tire Shop to better jobs in the Maintenance Department, management has discouraged the move by informing the transfer-aspirant that he must resign for a period of six weeks and then reapply, or simply that transfers are not permitted. Further, although any Maintenance Department employee may theoretically use his full departmental seniority in bidding on any Maintenance Department

11. The 3.3% figure is taken from a seniority list supplied by Bowman shortly before trial. The district court found that "some 10%" of the OTR drivers were black at the time of trial, but it did not indicate the source of this later statistic. Finding no basis in the record for the 10% figure, we believe it must be the result of an oversight, and we accept appellants' unanswered contention that it is clearly erroneous. In the absence of some evidence showing a drastic increase in the percentage of black OTR drivers in the last month before trial, the figure must be considered to have been about 3.3% at the time of trial.

job, inter-shop transfer attempts by seniority bidding are largely prevented by the expedient of posting job openings only in the shop where they occur, so that employees in the other shops remain ignorant of them. For example, an opening in the Tractor Shop would be posted only in the Tractor Shop area, so that Tire Shop employees with seniority would not become aware of it and thus have a meaningful opportunity to bid for it.

At the time of trial Bowman had never hired a black office worker at the Atlanta terminal. Clerical job vacancies are not advertised publicly, but are communicated by current clerical employees to acquaintances by word of mouth. Only three or four blacks applied for clerical positions in the five years preceding trial. Until spring of 1971 Bowman used the race-oriented Wonderlic test to screen clerical job applicants and it rejected two black applicants on the basis of the scores obtained.[12]

The district court found that Bowman had not practiced racial discrimination in hiring office and clerical workers.[13]

12. The use of the Wonderlic test to screen job applicants was held to constitute prohibited racial discrimination in Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 because it yielded significantly different results for whites and blacks and was not shown to produce job-related information. Bowman has made no attempt to show that the Wonderlic test results were related to the requirements of its clerical jobs.

13. The district court's findings with regard to the office and clerical workers were as follows:

> The office employment situation stays rather stable and although there is a substantial number of applicants each year, the hiring rate is very low. In the past five years, there have only been a total of three or four Black applicants out of an average of 25 each year. Each of these applicants has been treated no differently from any other applicant and race has not been a factor in the employment policies in the office. At time of trial, one Black applicant has been deemed qualified and is waiting for an opening. There simply has been little interest by Blacks in clerical positions at this company and no evidence is produced of racial discrimination in this department.

With regard to the OTR drivers, dock workers and city drivers and Maintenance Department employees, it found that, while discriminatory policies had existed in the past, they had, by the time of trial, given way to "an official policy against discriminatory hiring in all of its [Bowman's] hiring practices." The departmental seniority system, however, perpetuated the effects of past discrimination.

B. Relief Granted by the District Court

The district court's order defining the classes represented and granting injunctive relief reads as follows:

> In accordance with the findings of the Court, the defendant, BOWMAN TRANSPORTATION COMPANY, and the defendants, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, their officers, agents, employees, servants, and all persons in active concert or participation with them, are hereby permanently *enjoined* and *restrained* from discriminating against any Black applicant or Black employee of the defendant, Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers in violation of Title VII of the Civil Rights Act of 1964.
>
> The defendants are enjoined from implementing a seniority system which would interfere with the rights under this judgment of black employees in the classes herein defined.
>
> AFFECTED CLASSES.
>
> The affected classes are defined by the court as follows:
>
> CLASS 1. All Black employees at the Atlanta Terminal who were hired prior to August 15, 1968.

CLASS 2. All Black employees employed at the Atlanta Terminal in the Maintenance Department prior to May 1, 1970.

CLASS 3. All Black applicants who applied for positions as over-the-road drivers prior to January 1, 1972.

CLASS 4. All Black employees who applied to transfer to over-the-road drivers positions prior to January 1, 1972.

ORDERS.

The members of CLASS 1 have all been restricted to jobs in the Tire Shop prior to August 15, 1968, by the racially discriminatory policies of the defendant company. Hereafter any member of the affected class who competes with a non-member in a bid to transfer or be promoted within the company shall be entitled to compete on the basis of company seniority until such date plus any departmental seniority thereafter, rather than departmental seniority only.

The members of CLASS 2 have been restricted to jobs in the Tire Shop and prevented from transferring to the Tractor and Trailer Shops within the Maintenance Department by the racially discriminating policies of the defendant company. All such members shall be notified of the right to bid within the department at the next annual bidding. If bids are lodged and the member is deemed qualified, he shall thereafter be credited with departmental seniority from the date of original employment in all future bidding.

The members of CLASS 3 have been effectively denied employment as over-the-road drivers prior to January 1, 1972. All Black applicants as revealed by the company records prior to such date shall be notified in writing of their right to be considered for employment by the company within 30 days and given 30 days thereafter to indicate their interest. If consideration is requested, then they shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company. Two applicants,

Harbor and McLoughlin, shall be considered within 15 days by the company. In any such applications, race shall not be used by the company as a means of denying employment to any applicant.

The members of CLASS 4, who sought to transfer from a job as "city driver" or elsewhere to road driver shall likewise be afforded priority in consideration for such employment in chronological order along with the members of CLASS 3.

A copy of this order, or such substituted order as agreed upon by counsel, shall be posted in a conspicuous place in each department and sub-department of the Defendant, Bowman Transportation Company's Atlanta Terminal and in the office of each terminal and warehouse of the Defendant elsewhere for the period of 60 days. In addition, all bids shall hereafter be posted in each sub-department and shop in the Atlanta Terminal.

The court's conclusions of law indicate that Franks represented the first two of the "affected classes" and Lee represented the second two. Analytically, a fifth class is implicit in the first paragraph of the district court's order—the class of all black job applicants and employees of Bowman. The four enumerated categories may be considered subclasses within this larger class. Their apparent purpose is to delineate the groups which the district court concluded were entitled to a special affirmative remedy, beyond the general prohibition against future discrimination. August 15, 1968, the date used to define class 1, is the day the first black dock worker at the Atlanta terminal was hired. The district court evidently found that the discrimination barrier which excluded blacks from employment in the City Driver and Dock Department wholly dissolved on that day. The dates used to define the remaining classes are not tied to concrete events in the record; it appears that the district court believed discrimination in the relevant areas ceased on approximately the days

indicated. Although appellants cast their arguments in terms of remedy, and do not directly assail the definition of the classes, or subclasses, and although we shall in the remainder of this opinion speak in terms of remedies, it is clear that modifications in the remedy afforded could necessitate redrawing to some extent, the classes. Where appropriate, such redrawing should be performed on remand. *See* Johnson v. Georgia Highway Express Co., 5th Cir. 1969, 417 F.2d 1122, 1124.

C. Standard of Review

The power of the district court to fashion an equitable remedy is broad:

> Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554. Generally, the exercise of this equitable discretion will be disturbed on appeal only for an abuse of discretion.

[12] The limits of the district court's discretion are marked by its duty to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination. Vogler v. McCarty, Inc., 5th Cir. 1971, 451 F.2d 1236, 1237; *cf.* Louisiana v. United States, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709. To accomplish this end, the district courts are not "limited to simply parroting the Act's prohibitions." Local 53 of International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5th Cir. 1969, 407 F.2d 1047, 1052. Rather they should order "such affirmative action as may be appropriate." § 706(g) of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e–5(g). If an appellate court can determine from the record that the relief granted is not sufficient to

make the discriminatee whole as far as possible, then the district court's order falls outside the bounds of its discretion. For some recurrent problems, we have had occasion in previous cases to discuss the minimum appropriate remedy, and such cases provide more specific limits and guidelines for the exercise of discretion. *See, e. g.*, Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, 5th Cir. 1969, 416 F.2d 980, cert. denied 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (seniority relief).

D. Asserted Inadequacy of the District Court's Decree

1. Seniority Relief

The district court's order allowed members of class 1 (all present black employees at the Atlanta terminal who were hired before August 15, 1968) to compete for jobs on the basis of company seniority accumulated before August 15, 1968, the date the first black dock worker was hired, and departmental seniority accumulated thereafter. Appellants characterize this aspect of the decree as "halfway seniority relief." They contend (1) that members of class 1 should be allowed to use company seniority accumulated after as well as before August 15, 1968, (2) that members of class 4 (present Bowman employees who applied to transfer to OTR positions before January 1, 1972) who are hired as OTR drivers pursuant to the court's decree should be able to use company seniority for all purposes in the OTR Department, and (3) that members of class 3 (pre-January 1, 1972 black OTR applicants) who are hired pursuant to the court's decree should be awarded constructive OTR departmental seniority beginning on the date they would have been hired but for the discrimination.

[13–16] When a departmental seniority system perpetuates the effect of past discrimination it is an unlawful employment practice proscribed and remediable under Title VII. *E. g.*, United States v. Bethlehem Steel Corporation, 2nd Cir. 1971, 446 F.2d 652; Robinson v. Lorillard Corp., 4th Cir. 1971,

441 F.2d 791, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, *supra*; Quarles v. Philip Morris, Inc., E.D.Va.1968, 279 F.Supp. 505. Though not as drastic as a rigid no-transfer rule, a departmental seniority system discourages transfers and thereby locks a discriminatee into his inferior job by threatening him with loss of his accumulated seniority if he should transfer. "In any industry loss of seniority is a critical inhibition to transfer." United States v. Jacksonville Terminal Co., 5th Cir. 1971, 451 F.2d 418, 453, cert. denied 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. That the system is racially neutral on its face does not save it under Title VII if its effect is to "cut into the employees' present right not to be discriminated against on the ground of race." *Local 189, supra* at 988; *See also* United States v. Jacksonville Terminal Co., *supra* at 451. The federal courts' power to modify or suspend the operation of a discriminatory seniority system is not affected by the fact that the seniority system has been established in a private, collective bargaining agreement. Vogler v. McCarty, Inc., 5th Cir. 1971, 451 F.2d 1236. The only ground upon which a discrimination-perpetuating seniority system may be defended is that of business necessity. "When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 10th Cir. 1970, 431 F.2d 245, 249; *see* Robinson v. Lorillard Corp., *supra* at 797; *Local 189, supra.*

In this case it is undisputed that the members of class 1 were originally relegated to inferior jobs in the Tire Shop as a result of Bowman's racially discriminatory hiring practices. Further, it is clear that the departmental seniority system has the forbidden effect of locking discriminatees into the pattern thus created. Neither Bowman nor the union has attempted to defend the seniority system as a "business necessity." As the district court recognized, class 1 members are entitled to

relief from the locking-in effect of the departmental seniority system. The question presented is what form the remedy must take and how far it must go.

The leading case in this Circuit on seniority relief under Title VII is Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, 5th Cir. 1969, 416 F.2d 980, cert. denied 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100, aff'g, E.D.La.1969, 301 F.Supp. 906. There, Judge Wisdom endorsed for our Court the "rightful place" [14] approach to seniority problems.

> A "*rightful place*" theory stands between a complete purge of "but-for" effects [and] maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

Id. at 988. He concluded that the decree entered by the district court in that case accorded with the rightful place interpretation of the Act. That decree "permanently abolished" the offending "job seniority system" and allowed discriminatees to compete for jobs on the basis of "mill seniority," which was to be computed from the beginning of the employee's service at the mill, regardless of the job slot he occupied, up to the date of his bid. United States v. Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC, E.D.La.1969, 301 F.Supp. 906, 919.

In the United States v. Jacksonville Terminal Co., 5th Cir. 1971, 451 F.2d 418, cert. denied 406 U.S. 906, 92 S.Ct. 1607, 31

14. The "rightful place," "freedom now," and "status quo" theories were first distinguished and analyzed in Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967).

L.Ed.2d 815, we applied the *Local 189* principles and found that the "craft and class" seniority system at issue in that case was a discriminatory unlawful employment practice under Title VII. We held that an appropriate remedial decree should grant to discriminatees "qualified to fill vacancies . . . the right to bid for . . . positions on the basis of Terminal seniority (time worked for the employer) rather than craft or class seniority." *Id.* at 454. In laying down guidelines which the decree should follow, we specified that discriminatees should be allowed to use Terminal seniority "until they successfully bid for, and retain after any on-the-job probationary or training period (if required), positions outside the craft or class which they occupy at the time of the District Court's decree." *Id.* at 458–459.

In United States v. Bethlehem Steel Corp., 2nd Cir. 1971, 446 F.2d 652, the Second Circuit established similar guidelines. Disapproving a discrimination-perpetuating departmental seniority system, it allowed discriminatees to transfer with seniority carryover "only once, and only during the next two years." *Id.* at 666. This once-only, two-year limitation was considered adequate to allow the discriminatee an adequate opportunity to break out of the racial pattern while not giving him a preferential advantage or imposing an unnecessarily unstable situation on the employer:

> Because a transferee will have only one opportunity of limited duration to transfer to a formerly "white" department, the Lackawanna plant will not be thrown into a chaotic game of musical chairs. . . . Nor will any employee have superseniority. . . .

Id. at 666.

In each of these cases the court has allowed discriminatees to use full company seniority to compete for job openings for at least a reasonable time after the entry of the court's decree. In *Local 189* the discriminatory system was "permanently abolished" and mill seniority substituted for discriminatees, presumably also permanently. In *Jacksonville Terminal*

discriminatees could use company seniority for transfer purposes only once but the use might possibly be delayed for a lengthy period. In *Bethlehem Steel* the court imposed a one-time or two-year limitation on discriminatees' right to transfer with full seniority carryover.[15]

[17] Both the precedents and the nature of the wrong, we think, indicate that the remedy afforded by the district court should allow to employees locked into old racial patterns by the departmental seniority system the use of full company seniority for transfer purposes for a reasonable time and for all purposes after transfer in the new department. The locking-in effect of departmental seniority on present employees does not cease as of the date that discrimination as to new hirees ceases. To allow for purposes of transfer—*i.e.* bidding on a new job in a different department—the use of company seniority accumulated only up to the date on which discrimination in hiring at the terminal ceased in the past would force discriminatees to compete with non-discriminatees on an unequal footing in the present. To permit only partial seniority carryover would only reduce the penalty which a discriminatee would suffer by transferring, but would not eliminate it. The district court's decree should dissolve the barrier to transfers completely by allowing the use of full company seniority. Pettway v. American Cast Iron Pipe Co., 5th Cir. 1974, — F.2d — [No. 73–1163, Apr. 29, 1974]. Further, the discriminatee should be allowed a reasonable time for using company seniority to escape the racial patterns created in the past. The right of the discriminatee to transfer with seniority carryover on the basis of company seniority need not be extended indefinitely into the future, but a

15. Compare Quarles v. Philip Morris, Inc., E.D.Va.1968, 279 F.Supp. 505, where the court required a prompt declaration of interest by discriminatees and prompt screening to identify those who would be able to bid on the basis of company seniority, but designated no cut-off date in the future after which those discriminatees would no longer be able to use company seniority.

reasonable time after the entry of the decree must be allowed.[16]

This same reasoning applies to members of class 4 (black employees who applied to transfer to OTR positions prior to January 1, 1972) as well as other pre-January 1, 1972 black employees who were excluded from OTR jobs at the time of their original employment. Those who are found qualified for OTR jobs should be allowed to bid for them on the basis of company seniority and should not be penalized for accepting them by loss of all or a portion of their accumulated company seniority. They should be allowed to carry over accumulated company seniority for all purposes in the OTR department.[17] United States v. Bethlehem Steel Corp., *supra.*

In treating questions of seniority here, we do not, of course, suggest that Bowman must hire without regard to qualification. "Secretaries must be able to type. There is no way around that necessity." *Local 189, supra* at 989. And truck drivers must be qualified to drive. But transfer applicants must be accepted or rejected, as the district court's decree requires, on the basis of valid, non-racial criteria.

[18] In seeking application-date seniority for members of class 3 (black applicants who applied for OTR jobs before January 1, 1972) appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority.

16. We believe a one-transfer-only limitation would be reasonable also, either in conjunction with or in addition to the time limitation, since the discriminatee stands on a substantially equal footing with his white contemporaries once he has escaped the confines of the racial pattern in which he has been trapped.

17. In Bing v. Roadway Express, Inc., 5th Cir. 1973, 485 F.2d 441, we dated seniority for transferring road drivers from the date of qualification. In that case, Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use of company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR trainees with little or no prior driving experience.

They ask us to create constructive seniority for applicants who have never worked for the company. Granting that the black OTR applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of constructive seniority to them as a remedy. Section 703(h) of Title VII, 42 U.S.C.A. § 2000e–2(h), provides:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as "not an unlawful employment practice." Facing this problem in *Local 189*, Judge Wisdom wrote:

> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. . . . [C]reating fictional employment time for newly-hired Negroes would constitute preferential rather than remedial treatment.
>
> . . . . . .
>
> No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. . . . We conclude . . . that Congress exempted from the anti-discrimination requirement only those seniority rights which gave white workers preference over junior Negroes.

Local 189, supra at 995. We are guided by his reasoning here. The district court did not abuse its discretion in refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy.

In conclusion, we agree with appellants' contention that present Bowman employees who have been discriminated against in the past and remain locked-in to the racial pattern by departmental seniority must be allowed to compete for jobs in other departments on the basis of full accumulated company seniority, and that this remedy should be made available for a reasonable time to permit them to take advantage of it. On remand the decree should be modified in accordance with these views. We do not agree that constructive seniority may be created and awarded to those who are not employees.

2. Affirmative Hiring Relief

[19] Appellants next contend that the District Court's decree was deficient in failing to provide (1) that Bowman must conduct an active recruitment campaign designed to attract black OTR applicants and must hire one black OTR driver for every new white OTR driver hired until twenty percent of the OTR drivers are black, and (2) that Bowman must actively recruit black office and clerical workers in a manner specifically designed to inform the black community of clerical job opportunities. Appellants included both of these measures in a proposed decree which they submitted to the District Court.

The record in this case shows that Bowman followed a conscious policy of excluding blacks from its OTR Department until September 1970, a time over five years after the effective date of the Civil Rights Act of 1964. The District Court found that Bowman, although aware of its legal obligations, intentionally continued to follow its discriminatory policy and put off hiring black OTR drivers as long as it could. It began hiring black OTR drivers in 1970 only under pressure from the OFCC and at least one EEOC complaint. As we have often

observed, actions taken under such pressure and in the face of threatened or pending litigation are at best "equivocal in purpose, motive and permanence." Jenkins v. United Gas Corp., 5th Cir. 1968, 400 F.2d 28, 33; *see also* Rowe v. General Motors Corp., 5th Cir. 1972, 457 F.2d 348, even when they are drastic and go far toward remedying the effects of past discrimination. In this case, the sincerity and permanence of Bowman's conversion to nonracial employment practices are all the more dubious in light of the steadily declining rate at which Bowman has hired black OTR drivers after September of 1970 and in light of the small percentage (3.3%) of the OTR Department which was black at the time of trial.[18] Public recruitment has been granted previously as a remedy in racial-discrimination cases,[19] and we agree with appellants that this case calls for such a remedy.

At the time the District Court entered its findings of fact, conclusions of law, and order and decree in March, 1972, it did not have the advantage of our *en banc* decision in Morrow v. Crisler, 5th Cir. 1974, 491 F.2d 1053. *Morrow* considered the precise charge made here: that the District Court failed to order sufficient affirmative relief. The *en banc* court there remanded for additional consideration where the events since the District Court decree indicated the initial relief to have been insufficient.

We would vacate so much of the District Court's decree as denies the request for additional affirmative relief and re-

18. *See* note 10, *supra*, & accompanying text.

19. Public recruitment aimed at blacks was held mandatory in United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 926 and in United States v. Sheet Metal Workers International Association, Local 36, AFL–CIO, 8th Cir. 1969, 416 F.2d 123, 139–140. It was also a part of the remedy granted in the following cases: United States v. Ironworkers Local 86, W.D.Wash.1970, 315 F.Supp. 1202, aff'd 9th Cir. 1971, 443 F.2d 544, cert. denied 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532; United States v. United Association of Journeymen, etc., Local No. 73, S.D.Indiana 1969, 314 F.Supp. 160. The power of the court under Title VII to order, as a remedial measure, advertising and recruitment efforts aimed at minority groups cannot be seriously questioned.

mand to the District Court to update the record in this case, which is now over two years old, and to consider what, if any, additional affirmative relief may be necessary in light of current facts and our decision in *Morrow*.

The hurdle which appellants must clear in order to be in a position to demand public recruitment of black office workers is the District Court's finding that Bowman does not discriminate in hiring office workers. We conclude that appellants have cleared this hurdle on the strength of their proof below that Bowman had never hired a black office worker, relied on word-of-mouth advertising to fill vacancies which became available, and followed patently discriminatory practices in connection with the employment of drivers by the Company.

The underlying findings upon which the District Court relied in making its no-discrimination finding were: (1) only three or four of the approximately twenty-five clerical applicants each year are black, (2) blacks have shown little interest in office jobs, and (3) black applicants are treated no differently than white applicants. Further pertinent facts appearing in the record, which are not disputed, are (4) that Bowman had never hired a single black office or clerical worker in Atlanta by the time of trial, and (5) Bowman did not publicize office job vacancies but relied on word-of-mouth advertising by the current all-white office staff.

The most vociferous figure regarding the office and clerical workers in this case is that Bowman's office staff was at the time of trial and had always been one hundred percent white. This statistic alone raises a question concerning racial discrimination in Bowman's hiring of office workers. See United States v. United Brotherhood of Carpenters and Joiners of America, Local 169, 7th Cir. 1972, 457 F.2d 210, 214; United States v. Hayes International Corp., 5th Cir. 1972, 456 F.2d 112, 120. It has not been shown to be the result of any business necessity, or extenuating circumstances, or any cause other than a preference for whites in hiring.

The suggestion that the all-white composition of the office staff is due to lack of interest on the part of blacks or the small number of black applicants is singularly unpersuasive in view of Bowman's heavy reliance on word-of-mouth recruiting. We recognized recently in United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 925, that when all current employees in a unit are white "word-of-mouth hiring alone would tend to isolate blacks from the 'web of information' which flows around opportunities at the company." Although this recruiting method is racially neutral in form, in practice it operates as a "builtin headwind" to blacks. *Id.*; Parham v. Southwestern Bell Telephone Co., 8th Cir. 1970, 433 F.2d 421; Clark v. American Marine Corp., E.D.La.1969, 304 F.Supp. 603, 606, 608. No business necessity for Bowman's exclusive reliance on this recruiting method has been shown or argued.

Inasmuch as the record is clear as to the discriminatory employment practices concerning drivers, we think that the above evidence was sufficient to carry the plaintiff's burden of proof that discrimination in hiring office workers was sufficiently shown to justify some relief.

Under the circumstances of this case we agree with appellants that the District Court's failure to order some hiring relief in the form of public recruitment to attract black office and clerical workers, as well as to attract OTR applicants, was an abuse of discretion, and that advertising of office job vacancies through some medium designed to reach blacks would be appropriate.

We do not specify the precise form which such recruiting is to take. "[A]dvertisements of openings in newspapers and periodicals accessible to the black communities of Atlanta and other Georgia cities, and public notice that the company is an equal opportunity employer, are common recruiting techniques which should be considered. . . . We hold only that the present word-of-mouth practice must be supplement-

ed or changed." United States v. Georgia Power Co., *supra*, at 926.

In summary, we conclude that this case warrants affirmative hiring relief for potential black OTR drivers in the form of public recruitment, consideration of additional affirmative relief in the light of our opinion in *Morrow*, and affirmative hiring relief for potential black office workers in the form of public recruitment. We leave to the District Court the task and prerogative of devising the particular form these remedies should take and of framing an appropriate decree.

3. Mandatory Training for Discriminatees

[20] Appellants next ask that Bowman be ordered to establish special training programs to upgrade the skills of discriminatees and to facilitate their movement out of inferior jobs.

Bowman's record of denying training opportunities to blacks is bad. From 1968 to 1971 Bowman hired 75 to 150 white OTR drivers with no prior truck driving experience and trained them by assigning them to "ride double" with experienced drivers. At the same time, assertedly because of the racial prejudice of all its white drivers, similar training opportunities were denied blacks. Prior to August of 1968 blacks were absolutely excluded from city driver jobs, which may lead to qualification for OTR jobs. In the Maintenance Department, black Tire Shop employees have been denied access to jobs through which they might progress to mechanic position.

At a minimum, an effective remedy in this case must allow black applicants and new employees access to training opportunities on an equal basis with whites in the future. This requirement is implicit in the first paragraph of the district court's decree. It is little more than an echo of Title VII's general prohibition against discrimination in hiring and promoting. Further, if black Bowman employees who are presently locked into racial patterns due to past discrimination are

to have a meaningful opportunity to advance, we think they must be afforded special temporary remedial training opportunities. A Tire Shop employee's seniority will be of little use to him in bidding on a mechanic's slot so long as he lacks the necessary skills. As the district court observed, "as a practical matter, nobody in the tire shop can bump a mechanic."

Heretofore Bowman has trained its employees on the job. Inexperienced OTR drivers ride double with experienced drivers. Certain jobs in the Maintenance Department are training steps to the mechanic jobs, and city driver jobs lead to qualification for OTR jobs. On remand the district court should identify those positions which are training grounds, and impose conditions to ensure that a substantial number of Bowman's employees who have been discriminatorily relegated to inferior jobs in the past are afforded a ready access to them. Pettway v. American Cast Iron Pipe Company, supra.

In analogous employment discrimination cases, some courts have ordered the creation, at company expense, of counselling and training programs to which discriminatees must be admitted in certain numbers each year or according to a fixed ratio until they hold a certain percentage of the skilled positions. *See* Buckner v. Goodyear Tire & Rubber Co., N.D.Ala.1972, 339 F.Supp. 1108, 1124–1125; United States v. Ironworkers Local 86, W.D.Wash.1970, 315 F.Supp. 1202, 1247–1250, aff'd 9th Cir. 1971, 443 F.2d 544, cert. denied 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367. From our appellate prospective, we cannot say that the creation of special new training programs is necessary in this case to afford discriminatees an opportunity to overcome the effects of past discrimination. The inadequacy of existing training methods to accomplish this purpose is not demonstrated in the record. If the district court should find, however, that further remedial measures are necessary to afford adequate training opportunities, it may fashion and grant them.

4. Retention of Jurisdiction

[21] Bowman maintained blatantly discriminatory policies at least until September of 1971, over five years after the passage of Title VII. Since that time it has moved some distance toward complying with Title VII's mandates, but only under pressure from government agencies and in the face of threatened litigation. These circumstances, as well as the decreasing rate at which it has hired black OTR drivers, necessarily cast some doubt on its intention to discontinue and remedy its unlawful employment practices voluntarily. The district court should retain jurisdiction of this case for at least two years and require periodic reports from Bowman which will enable it to ascertain that the remedial measures it mandates are being carried into effect.

E. Back Pay

[22] The district court denied back pay to the affected classes on the basis of its conclusions that such relief (1) would be inconsistent with the purpose of Title VII to promote conciliation rather than litigation where possible, and (2) would not be "warranted" in a Rule 23(b)(2) class action, which contemplates primarily injunctive and declaratory relief. In addition, the court stated back pay to non-named class members was denied in the exercise of discretion. We do not agree that either Rule 23(b)(2) or Title VII prohibits back pay awards to non-named class members. Further, since it appears that the district court exercised its discretion under an erroneous view of the applicable law, we vacate its decree insofar as it denies back pay to the class and remand for reconsideration of this issue. *Cf.* United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 921; Johnson v. Goodyear Tire & Rubber Co., 5th Cir. 1974, 491 F.2d 1364; Pettway v. American Cast Iron Pipe Co., supra.

The remedies authorized in Title VII specifically include back pay. As indicated above, the purpose of Title VII is to make the discriminatee whole and eliminate the effects of past discrimination as far as possible. Where the discriminatee has suffered economic injury in the form of lost wages, back pay is normally appropriate relief. Harkless v. Sweeny Independent School District, 5th Cir. 1970, 427 F.2d 319, 324. The district court recognized this in awarding back pay to Lee. One apparent source of its reluctance to extend this remedy to class members was its view that to do so would allow class members to circumvent EEOC conciliatory efforts and thus frustrate Title VII's policy favoring resolution of problems through conciliation rather than litigation where possible. This view conflicts with what we said in Oatis v. Crown Zellerbach Corp., 5th Cir. 1968, 398 F.2d 496, 499:

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

See also Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283, 284–285. An EEOC complaint filed by the class representative allows an adequate opportunity for resolution of problems of the class through conciliation, Bowe v. Colgate-Palmolive Co., 7th Cir. 1969, 416 F.2d 711, 720, and opens the courthouse doors for the class. While *Oatis* and *Miller* did not focus particularly on the back pay relief sought, we see no basis for treating a back pay claim as unique and requiring each class member to file his claim with the EEOC before asserting it in the courtroom. The Seventh Circuit has reached the same conclusion on this issue:

> The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices, and to make whole, in a pecuniary fashion, those who have suffered by it. To

permit only injunctive relief in the class action would frustrate the implementation of a strong Congressional purpose expressed in the Civil Rights Act of 1964. To require that each employee file a charge with the EEOC and then join in the suit would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted.

Bowe v. Colgate-Palmolive Co., 7th Cir. 1969, 416 F.2d 711, 720. We believe this view is correct, and we hold that neither the letter nor the spirit of Title VII precludes back pay awards to non-named class members when only the class representative has filed an appropriate EEOC complaint.

Nor does Fed.R.Civ.P. 23(b)(2) prohibit back pay awards to non-named class members in a class action under that subdivision of the rule. Pettway v. American Cast Iron Pipe Co., supra; Robinson v. Lorillard Corp., 4th Cir. 1971, 444 F.2d 791, 802, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655. It is true that Rule 23(b)(2) refers only to "injunctive relief or corresponding declaratory relief" and "does not extend to cases in which the appropriate final relief relates *exclusively* or *predominantly* to money damages." Advisory Committee's Notes, 1966, 39 F.R.D. 69, 102 (emphasis added). But this Title VII action cannot be characterized as one seeking "exclusively or predominantly money damages." As we have pointed out above, back pay awards under Title VII (and under § 1981 to the extent that a § 1981 corresponds to a Title VII action) are not damages, as such, but an integral part of the equitable remedy. Even if back pay is considered as equivalent to damages under Rule 23, in this case back pay is not the exclusive or predominant remedy sought.

The district court should devise an appropriate procedure for adjudicating the claims of non-named class members for back pay awards. Johnson v. Goodyear Tire & Rubber Co., supra. Reliance on a master may be appropriate. Pettway v.

American Cast Iron Pipe Co., supra; *cf.* Robinson v. Lorillard Corp., M.D.N.C.1970, 319 F.Supp. 835, 843, aff'd 4 Cir., 444 F.2d 791, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655. Insofar as the district court's judgment denies back pay to non-named class members it is reversed, and this issue is remanded for reconsideration in light of the principles enunciated above.

IV. Summary

In summary, we hold:

(1) Franks' individual claim was not barred by limitations, and, subject to the district court's determination as to the applicability of laches, the district court should on remand enter judgment in his favor and grant him an appropriate remedy;

(2) the district court's determination of the facts relating to Lee's individual claim was not clearly erroneous;

(3) the class and subclasses represented are entitled to further affirmative relief than was afforded by the district court's decree, including the use of full company seniority for black Bowman employees who currently remain locked into old racial patterns, public recruitment aimed at potential black OTR drivers and clerical employees, temporary measures to ensure access to training opportunities for discriminatees, and such *Morrow* type affirmative hiring relief as the district court deems appropriate. The district court should retain jurisdiction of this case and require compliance reports from Bowman for at least two years. The district court's denial of back pay to non-named class members is reversed and the issue is remanded for reconsideration in light of this opinion and Johnson v. Goodyear Tire & Rubber Co., supra.

Costs on appeal will be taxed one-tenth against Lee, three-tenths against the union, and six-tenths against Bowman. Appellants' attorneys are entitled to an award for fees earned in the prosecution of this appeal under 42 U.S.C.A. § 2000e–5(k). On remand the district court should determine an appropriate fee award.

The district court's judgment is affirmed in part, reversed in part, vacated in part, and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 72-3239

D. C. Docket No. CA 15,086

HAROLD FRANKS,
Plaintiff-Appellant,

JOHNNY LEE,
Intervenor-Appellant,

versus

BOWMAN TRANSPORTATION COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part, and vacated in part; and that this cause be, and the same is hereby remanded

to the said District Court in accordance with the opinion of this Court.

It is further ordered that intervenor-appellant Lee be condemned to pay one-tenth of the costs on appeal to be taxed by the Clerk of this Court; and that defendant-appellee the union be condemned to pay three-tenths of said costs; and that defendant-appellee Bowman Transportation Company be condemned to pay six-tenths of said costs.

Issued as Mandate: June 3, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3239

HAROLD FRANKS,
Plaintiff-Appellant,

JOHNNY LEE,
Intervenor-Appellant,

versus

BOWMAN TRANSPORTATION COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(Filed July 15, 1974)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by defendant-appellee Bowman Transportation, Inc. in the above entitled and numbered cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

Office of the Clerk

September 12, 1974

TO ALL COUNSEL OF RECORD

Re: 72-3239—Franks, et al., vs. Bowman Transportation Co., et al.,

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk
By /s/ Arvin G. Parens
Deputy Clerk

cc: Messrs. Howard Moore, Jr.,
Elizabeth R. Rindskopf
Messrs. Jack Greenberg
William L. Robinson
Morris J. Baller
Messrs. David L. Rose
William B. Fenton
John M. Gadzichowski
Mr. William M. Pate
Messrs. Robert B. Hocutt
James W. Dorsey

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NUMBER 15086

HAROLD FRANKS,
Plaintiff

vs.

BOWMAN TRANSPORTATION COMPANY, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA; and, INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA,
Defendants

JOHNNIE LEE,
Plaintiff-Intervenor

(Filed June 29, 1972)

This is a suit brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e ff), alleging racial discrimination in various employment practices of the defendant company at its Atlanta Terminal and through its collective bargaining agreement with the defendant union. The petition was originally brought by the plaintiff Franks, after processing of his complaint by the EEOC, both on his individual claim and as a class action. Subsequently, the court permitted the intervention of Johnnie Lee on his individual claim, also processed by the EEOC, and on behalf of another class of employees not represented by Franks. As finally constituted, the case presents

the class questions of racial discrimination in the hiring, transfer, promotion and discharge practices[1] in the following departments:

(a) Over-the-road drivers

(b) Dock and City drivers

(c) Maintenance

(d) Office and clerical.

In the individual claims, Franks seeks redress for his discharge from the Maintenance Department on or about May 10, 1968. Lee seeks redress for an original failure to hire, for failure to transfer, and for discharge as an over-the-road driver on or about March 19, 1971. On the evidence presented the court makes the following

FINDINGS OF FACT

The Class Action.

The defendant, Bowman Transportation, Inc., (the Company) is a licensed common carrier operating along the eastern seaboard and in certain areas of the midwest under ICC and state regulations. It operates major terminals at Atlanta, Richmond, Charlotte and Birmingham. Its principal office and garage has been located at Gadsden, Alabama, but is in process of being transferred to Atlanta. Each major terminal operates as a hiring center not only for terminal employees but for over-the-road drivers who, of course, operate system wide. After a bitter struggle, the company was unionized by the other defendants and col-

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1. Originally, the petition attacked the use of a high school education requirement and certain testing as employment requisites in the office. However, this issue has been mooted by the company's abolition of such requirements over a year prior to trial.

lective bargaining agreements were sucessfully negotiated in 1967 and 1970.

By their terms, the job classifications at the Atlanta terminal are divided into three departments: (a) Over-the-road drivers; (b) City Drivers and Dock Workers; and (c) Maintenance Department, which embraces the Tractor Shop (including engine repair), the Trailer Shop (including body repair), and the Tire Shop. Road drivers throughout the system constitute a single department. Office, sales and clerical jobs are non-union, but in essence constitute another department at each terminal. Thus, this suit in its class aspects involves all road drivers system-wide and all other employees at the Atlanta terminal (Dock, Maintenance, and Office Departments).

Prior to 1968, the company was almost totally segregated by race. Each department and sub-division did its own hiring and adhered to strict racial lines. Moreover, transfers from one to the other were discouraged and virtually prohibited by management. Only an approved "hardship case" warranted a transfer of any kind and this was a rare occurrence. Prior to 1968, no Black person had ever been employed in any job outside the Maintenance Department. With the exception of two "clean up men" in the Trailer Shop, all Black employees were assigned to the Tire Shop which was predominantly Black with white supervision. The percentage of Black employees at the Atlanta terminal remained at 1% or less until that time. By August, 1971, it has risen to only 4.5%.

The following represents an accurate distribution of jobs by race as of the dates indicated:

Dept./Job	July, 1965 Blacks	July, 1965 Whites	March, 1968 Blacks	March, 1968 Whites	August, 1971 Blacks	August, 1971 Whites
Office & Managerial	0	23	0	27	0	42
Sales Personnel	0	6	0	5	0	5
Office/Clerical	0	27	0	63	0	53
Ship Parts Clerk	0	8	0	9	0	9
Over-the-Road Drivers						
Atlanta Terminal	0	360	0	361	0	230
All Other	0	55	0	103	11	269
TOTAL	0	415	0	464	11	499
City Driver/ Dock Jobs						
City Drivers	0	79	0	80	3	81
Checkers	0	23	0	127	4	103
Dock Workers	0	84	0	94	6	60
TOTAL	0	186	0	301	13	244
Shop Workers						
Mechanics	0	70	0	92	0	63
Trailer Shop	-	-	-	-	0	36
Grease/Oil Men	0	6	0	8	0	4
Tire Shop	7	1	9	3	16	2
Clean-up Men	-	-	1	1	4	0
Janitors	0	1	0	2	1	1
TOTAL	7	78	10	106	21	106
TOTAL EMPLOYEES	7	743	10	1025	45	958

By wage, Blacks were consistently frozen into the lower paying jobs. The following represents an accurate distribution of wage classifications by race as of the dates indicated.

March, 1968

Weekly Wage:	Number of Blacks	Number of Whites	Percent Blacks
More than $150 (Road Drivers)	0	464	0.0%
$125-150 (Terminal Employees)	0	393	0.0%
Less that $125 (Terminal)	10	12	45.5%
TOTAL	10	869	1.1%

August, 1971

Weekly Wage:	Number of Blacks	Number of Whites	Percent Blacks
More than $225 (Road Drivers)	11	499	2.2%
$125-210 (Terminal Employees)	13	343	2.7%
$175 (Terminal)	20	6	76.9%
TOTAL	44	848	4.9%

In its hiring policies, the company relied largely on referrals from other employees or "walk-in." The former ordinarily applied in the department to which he was referred and this perpetuated the racial make-up of the respective departments. With the exception of an insignificant number of Black applicants specifically applying for office jobs (four), the walk-ins were ordinarily referred to departments by race. Blacks were specifically directed to the Tire Shop.

Partly because of existing ICC/ODT requirements the company exercised greater selectivity in the employment of over-the-road drivers. Qualifications of age, health, experience and mechanical ability were required. For awhile written ODT tests were required. In addition, the company sought to impose stricter standards for references and clean traffic records. Following personal interview and approval, the new employees, if experienced, "ride double" for a required period and if inexperienced obtain on-the-job training in the same fashion. These policies re-

quired the sharing of cabs and bunk-rooms and showers on the road. As a result there was considerable driver resentment against the hiring of Black road drivers. Prior to 1970, management discussed the situation many times and, fearful of driver reaction, adopted an unwritten policy against hiring Blacks for such jobs. Only a handful applied and they were not really considered. Similarly, any efforts of a city-driver to transfer to the road were effectively discouraged. By different methods, the hiring of Black road drivers was "put off as long as could" by the company. With the exception of a few lease-truck operators, no Blacks ever served as road drivers until 1970.

In 1970, the company began receiving substantial numbers of Black applicants for the position of road driver. In response to mounting pressure and partly due to the filing of an EEOC complaint by the intervenor Lee in Birmingham, the company finally relaxed its policy. Black road drivers were hired at the several terminals for the first time on the following dates: Birmingham, September 11, 1970; Richmond, September 12, 1971; Atlanta, November 21, 1971; Charlotte, February 15, 1972. Prior to such dates, the company had available Black applicants who, if otherwise qualified, had experience with the same equipment as city drivers or with other transportation companies. At least two Blacks, Harbor and McLaughlin applied in late 1970 or early 1971 and were told there were no openings when in fact there were. On the facts, each appears experienced and not obviously disqualified and were entitled to consideration for employment at the time.

The company presently employs no racial discrimination in hiring road drivers and some 10% of such drivers are now Black. The policy has worked out satisfactorily and "a whole lot better" than management thought.

Meanwhile within the terminal, the 1967 collective-bargaining agreement effectively removed the "no transfer" policy formerly in existence and concurrently opened the way for Black hirings in all departments. As a result Blacks were first hired into former all-white jobs in the Dock department as checker on August 15, 1968; as dock worker on October 21, 1968; and as city driver on June 20, 1969. While the contract provided for interdepartmental transfer for the first time, it recognized a departmental seniority system. This effectively penalized any Senior Blacks wishing to transfer to a previously all-white department in favor of junior whites already employed therein.

While the open transfer provision has worked well in the Dock department since that time, it has not proven out in the maintenance department. The contract provides departmental bidding only and for an annual bidding in August and, in fact, all open jobs are posted. The processing of actual bids is in accordance with the contract and without racial discrimination. However, the efforts of Blacks to transfer out of the Tire Shop into the Tractor or Trailer shops have been significantly discouraged by management. The latter two shops, of course, require considerable mechanical skill and experience. As a result, most hirees are off the street or from outside garages. However, it is possible to begin as a "grease man" and no prior experience is necessary. From that job it is possible to progress to a C mechanic's job (essentially a helper) to B mechanic and finally to A mechanic. The "grease man" job is somewhat distasteful and for that reason many employees, including the vast number of Blacks in the Tire Shop, simply do not want it, even at the loss of an opportunity to progress out of a virtual "dead-end" job in the Tire Shop to the learning of a skilled trade. Some, however, do wish this opportunity. Upon inquiry they have been ad-

vised that it is necessary to resign for a period of six weeks and reapply, or that a straight resignation and reapplication is necessary, or told that he could not transfer. As a result, some Blacks failed to bid for openings in the Tractor and Trailer Shops in which they were genuinely interested. This practice on the part of the company has effectively maintained an all-white Tractor and Trailer Shop. There is no evidence of a failure to hire qualified Black mechanics who originally applied for employment in the Tractor or Trailer shops.

The office employment situation stays rather stable and although there is a substantial number of applicants each year, the hiring rate is very low. In the past five years, there have only been a total of only three or four Black applicants out of an average of 25 each year. Each of these applicants has been treated no differently from any other applicant and race has not been a factor in the employment policies in the office. At time of trial, one Black applicant has been deemed qualified and is waiting for an opening. There simply has been little interest by Blacks in clerical positions at this company and no evidence is produced of racial discrimination in this department.

The company now has an official policy against discrimination in all of its hiring practices.

CONCLUSIONS OF LAW

The court has jurisdiction of this action pursuant to Section 706(f) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(f). The defendant, Bowman Transportation Company, is an employer engaged in industry affecting commerce within the meaning of Section 701(b) of the Act, 42 U.S.C. §2000e(b). The defendant Unions are labor or-

ganizations engaged in industry affecting commerce within the meaning of Section 701(d)(e) of the Act, 42 U.S.C. §2000e(d)(e).

The evidence shows a pattern of racial discrimination in the hiring, assignment, transfer, and discharge policies of the company and such practices as perpetrated by the Bargaining Agreement with the unions constitute unlawful employment practices under the Act. 42 U.S.C. §2000e-2(a). E.g. *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th 1971); *United States* v. *Hayes International Corp.*, 514 F.2d 1038 (5th Cir. 1969).

The action is maintainable as a class action under Rule 23(b)(2). E.g. *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). The plaintiff Franks represents all Black applicants/employees hired at the Atlanta Terminal and who sought employment/transfer to the Dock Department prior to August 15, 1968, or transfer within the Maintenance Department prior to May 1, 1972. The intervenor Lee represents all Black applicants who sought to be hired or to transfer to over-the-road driver positions prior to January 1, 1972.

Appropriate injunctive relief for such past discrimination, as provided in the attached decree is ordered. This will include credit for departmental seniority prior to the dates each such practice terminated plus preferential reapplication rights for identified applicants for certain positions.

The plaintiffs also pray for lump sum awards for back pay to any member of an affected class plus retroactive seniority to any rejected applicant. This court was faced with such claims in *United States* v. *Georgia Power Company*, ... F. Supp. ..... (N.D. Ga. 1971), 3 EPD ¶8318 and discussed the problem at length. Suffice it to say here, the

court concludes that such relief is not warranted in class actions. The claims for back-pay presuppose an opening, qualification and performance for every member of the class. The claims for retroactive seniority also presuppose a vacancy, qualification, and perfomance by every member. There is no evidence on which to base these multiple conclusions. More importantly, they bypass the statutory administrative prerequisites to personal suit established by the Congress and any appropriate statute of limitations. In essence, they seek to give individual compensation to the class in gross under circumstances where an individual could not qualify alone. The emphasis on private settlement in the Act is also thwarted by this device. See *Oatis* v. *Crown Zellerbach*, 398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1969). For these reasons as well as in the exercise of discretion, these remedies are rejected. Of course, where appropriate they will be afforded the individual claimants here under 42 U.S.C. §2000e-5(g).

Plaintiffs' attorneys are entitled to an award of fees for successful prosecution of this action. The court finds that plaintiffs' attorneys have reasonably spent approximately 200 hours in preparation and trial of this case. Considering the nature of the case, the results obtained, and the experience of the attorneys involved, the court finds in its discretion, such services to be reasonably worth the sum of $7,500.00. Such fees are assessed $6,000.00 on defendant Bowman and $1,500.00 on the remaining defendants. All statutory court costs are assessed on defendant Bowman upon presentation and approval of a proper cost bill.

THE INDIVIDUAL CLAIMS

The Franks Claim.

Plaintiff Harold Franks was hired as a Tire Man in Bowman's Atlanta Terminal Tire Shop on September 13, 1960. With the exception of one year beginning in 1961, during which plaintiff worked as a Grease Man, plaintiff was employed in the Tire Shop as a Tire Man. During 1965, plaintiff resigned due to injury and was rehired on May 16, 1966. In accord with Bowman's policy of assigning Blacks to the Tire Shop, plaintiff was again hired as a tire man earning $2.15 per hour.

Shortly after his return in 1966 he made several inquires about transfers to the Tractor and Trailer Shop and the Dock Department. In accordance with the then company policy, he was advised that transfers were not permitted. After the 1967 contract became effective he again inquired about transfers and was again told he could not.

Plaintiff Harold Franks filed his first charge of racial discrimination against Bowman with the EEOC on March 25, 1968, alleging that Bowman's no transfer rule was part of the company policy of restricting employment for Blacks to the Tire Shop.

Thereafter, EEOC officials investigated Franks' charge, visiting Bowman's Atlanta Terminal and talking with company officials on April 23, 1968, and May 10, 1968. The second visit occurred during the morning hours; Franks was discharged during the afternoon of the same day by his supervisor, Charlie Andrews, for "unauthorized bobtailing", or the use of company vehicles for personal use.

Tire Shop employees are required, as part of the job, to drive tractors to and from the tractor parking areas for service. It is a commonly accepted practice for employees

to do brief personal errands while driving the tractors on these occasions. Wth the exception of plaintiff Harold Franks, no Bowman employee has ever been discharged for "bobtailing" (driving tractor without trailer) on company property. All other discharges for unauthorized bobtailing occurred off of company property. This discharge was for reasons of race.

At the time, Franks was being paid at the rate of $2.60 per hour. However, it is not unreasonable to assume that by the end of 1967 he could legally have transferred to the position of Dock Worker, the entry level job in that department, the company having hired in excess of 50 during that year. A normal work week by the Union contracts is 45 hours and the pay in such job was $3.03 per hour.[2] Thus Franks would ordinarily be entitled to recover the difference in a wage calculated as a dock-worker and his interim earnings.[3]

However, the defendant has moved to dismiss the individual claim for failure to file suit within the 30-day period following issuance of the suit letter. This motion arises out of a confusing set of circumstances. Franks filed two separate EEOC charges: the first on March 25, 1968, alleging, among other things, failure to promote, i.e. trans-

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2. 1967 — $3.03 1970 — $3.94
1968 — $3.23 1971 — $4.34
1969 — $3.43 1972 — $4.74

3. Which are

1968	Harper Motor Lines, Inc.	$ 3,641.16
1969	Harper Motor Lines, Inc.	6,344.79
	Georgia-Alabama-Florida Transportation Co.	1,348.97
1970	Harper Motor Lines, Inc.	3,592.75
	Georgia-Alabama-Florida Transportation Co.	5,576.45
1971	Georgia-Alabama-Florida Transportation Co.	9,587.96
		$30,092.08

fer; the second on May 13, 1968, alleging a discriminatory discharge. By the end of 1969 these charges had been fully acted upon by the EEOC. Meanwhile, on March 21, 1969, Franks' then attorney requested the issuance of a suit letter on both charges. On the same day the suit letter[4] was mailed out to Franks. At the time, he resided at 5339 Victory Drive, Morrow, Georgia, but used 5319 Victory Drive, Morrow, Georgia, where his grandmother, sister and nephew, Calvin High, age 9, resided as his "mailing address" and all his mail was customarily delivered at the latter address. The suit letter was duly delivered there on March 22, 1969, and receipted by the nephew. Franks personally never saw the letter, but learned that High had signed for some letter at the time.

No suit was filed within 30 days after the March 21, 1969, suit letter and Franks' then attorney did nothing. Approximately 1-1/2-2 years later, Franks consulted his present attorneys. In the spring on or about March 2, 1971, apparently at their direction, he filed an "amended charge" reiterating the same charges (D 84-85), but referring to the two previous charges and citing May 10, 1968, as "the most recent date" on which discrimination occurred. A new suit letter issued on April 14, 1971, and this action was timely filed thereafter.

On these facts, the court concludes that the class aspects of the complaint, being continuing in nature, are viable under the 1971 suit letter, but the individual claim, being fixed in time, is barred.

Conclusions.

Title VII of the Civil Rights Act of 1964 has a built-in 90 day limitation in individual claims in that the charge

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4. Strangely, this letter and receipt were expunged from the EEOC file furnished counsel.

must be filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice. 42 U.S.C. §2000e-5(d). Likewise, suit must be filed within 30 days after receipt of the "suit-letter." 42 U.S.C. §2000e-5(e). For the purposes of individual relief, in a long line of cases each has been held to be jurisdictional. See *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888 (5th Cir. 1970); *Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970); *King* v. *Georgia Power Company*, 295 F. Supp. 943 (N.D. Ga. 1968); *Colbert* v. *H. K. Corporation*, 295 F. Supp. 1091 (N.D. Ga. 1968); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 304 F. Supp. 240 (E.D. La. 1969). Both of these limitations apply to an isolated completed act of discrimination such as failure to transfer or discharge, because they are not continuing in nature. Upon their happening, each complainant is immediately entitled to file charges with the EEOC and the limitations begin to run. See various rulings of The General Counsel of the EEOC: Dec. 2, 1965, LRX 1892a; Nov. 26, 1965, LRX 1892a; Jan. 11, 1966, LRX 1892a. In this instance, the two individual acts occurred no later than May 15, 1968. They were duly reported. At the request of plaintiff, a suit letter on both individual complaints issued on March 21, 1969. However, no action was filed until May 5, 1971, over two years subsequent to the issuance of the all-important suit letter.

It is true that Franks did not see his notice personally. However, it was delivered as all of his other mail was delivered and the defendant ought not to be penalized on that account. Moreover, it has long been considered that the acts and omissions of an attorney are the acts and omissions of the client. In truth, Franks' failure was that of his selected attorney, but the court knows no solution for such

failure absent fraud. From the defendant's point of view, the delay has deprived it of an opportunity to settle the claims at an early stage or, at the least, to mitigate the dollar damages. It would be unfair to allow the stale claims to be resurrected by securing a second "suit letter" as was done here. Accordingly, the claims for individual relief are barred by failure to file within 30 days of the issuance of the suit letter of March 21, 1969. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969).

The same result would be reached on the basis of §1983 jurisdiction because of the expiration of over two years between the "wrong" and the filing of the action in Georgia. E.g. *Shank* v. *Spruill*, 406 F.2d 756(1) (5th Cir. 1969). Ga. Code §3-704.

However, the class claims attacking the general employment practices of the defendant are viable under the second suit letter because they are continuing in nature. E.g. *Jenkins* v. *United Gas Co.*, 400 F.2d 28 (5th Cir. 1968); *Banks* v. *Lockheed-Georgia*, 46 F.R.D. 442 (N.D. Ga. June, 1968). Thus, they could be reported within 90-days of any day they exist and a suit letter thereon followed by a timely action would be allowed.

For the reasons stated, no back-pay or individual relief is awarded to plaintiff Franks and defendant is entitled to judgment thereon.

The Lee Claim.

Johnnie Lee, the intervenor is 38 years old. Prior to 1970, he had extensive experience driving trucks and tractor-trailers, principally in the Pensacola area. Included in his job history was some "over the road" experience with private carriers and some "city driver" experience with a common carrier. On or about January 5, 1970, he

applied at Bowman's Pensacola office for any kind of driving job. At the time, he was told there were no openings, but given a "city driver" application. He sent the application to the Atlanta Terminal on January 13, 1970, and it was returned with an "over-the-road" application. This application was also completed, but upon return on January 26, 1970, he was notified of his rejection. In February, 1970, he heard that a white road driver had been hired subsequent to his application and confirmed this personally. Thereupon, he filed a complaint with the EEOC. In early August, 1970, the company first notified him to go to the Birmingham Terminal. Following two additional letters he reported and was first hired as a road driver assigned to that Terminal on September 18, 1970. He worked continuously in that capacity until December 18, 1970, when he took a personal leave of absence on account of his wife's illness until early February, 1971. Upon return, he determined that his family situation could better be handled if he were assigned to the Atlanta Terminal. He contends that he asked for a transfer, but his testimony in this regard is extremely vague and the evidence fails in this respect. There is no written evidence of any such desire. Under the hardship rule regarding transfers, all must be approved by Mr. Dwight Rice, the company Director of Safety and Personnel in Atlanta and, as such, the virtual top supervisor of all road drivers. The Birmingham dispatcher positively testifies that no request, oral or written, was made to him and none was made to Rice. The court therefore must conclude that no valid request for transfer was made by Lee.

Lee continued to work out of the Birmingham Terminal after his return for several weeks using regularly Tractor No. 277. His service up until March, 1971, was entirely satisfactory to management and he had a good

record. Between March 11th and March 16th, Tractor No. 277 was given a complete 50,000 mile check at the Gadsden general garage, which services Birmingham. As a part of this process, the fuel pump is set so as to limit or "govern" the maximum RPM of the engine at moderate ranges of approximately 2000-2200. This, of course, limits the speed at which the unit can be driven. Following this procedure, Tractor No. 277 was checked and the fuel pump sealed at the proper RPM setting. The metal seal is designed to show if the fuel pump has been opened or tampered with outside of official garages. On or about March 16, 1971, Lee picked the unit up and made a regular run to the midwest. At about 6:00 A. M. on March 18th, he returned the Tractor to the Gadsden garage, and wrote a work order for additional repairs (failure to start and stiff gears), leaving it on the unit. Approximately one hour later, at 7:00 A. M. a B mechanic appeared on the scene and by 7:10 A. M. had checked in the unit. About 8:45, he commenced the repairs ordered by Lee. During the course of such repairs, it was necessary to accelerate the engine and in so doing, the mechanic noticed that the RPM was very high. He immediately called the shop foreman and together they rechecked the RPM which proved out at 2700-2800, far in excess of that officially allowed. Upon the foreman's instructions, the fuel pump was examined. The seal was broken and upon removal the fuel pump was found to have a block of wood, or "stinger" placed inside which effectively by-passed the governors. The incident was reported to the Birmingham safety supervisor, Woods. He immediately confronted Lee with the charge and it was denied. Nonetheless, Lee was immediately terminated under firm company policy which made discharge mandatory for any fuel pump tampering while the unit was in the driver's custody. The thrust of the policy is apparently aimed not only against personal guilt on the part of the driver, but

also to impose on the driver the responsibility to see that the governors are not overridden while the vehicle is in his custody.

Through the contractual grievance procedures, Lee's discharge was eventually submitted to binding arbitration. On October 25, 1971, the arbitrator found for Lee. In the finding (P #9), he rejected the company rule of absolute liability and concluded that while the "facts raise a strong inference approaching a presumption in the Company's favor", there was a "failure of proof" in that it did not exclude the possibility of other employees tampering with the fuel pump between 6:00 A. M. and the discovery of the stringer at 8:43 A. M. or during some other unknown period following the 50,000 mile check and Lee's receiving the unit. Reinstatement and back-pay were ordered. On October 29, 1971, reinstatement was tendered by the defendant and subsequently back-pay was forwarded to Lee in accordance with the contract. However, he refused to accept reinstatement at Birmingham and demands an assignment at Atlanta plus back pay until October 29, 1971.

The mandatory discharge rule for alteration of the fuel pump is one of long-standing. Between 1967 and trial, there were some 30 terminations or permitted resignations for violation of this rule. Some of the discharged drivers had received prior warnings for violations of other company rules not leading to mandatory discharge; but some, like Lee, had no prior warnings and possessed clean records at the time. There was no requisite of previous offense to the discharge. Most significantly, there is no indication and no evidence that any other driver, Black or white, was ever NOT discharged for violation of the standing rule. It is concluded that race was not a factor in the discharge of the intervenor Lee.

Between the filing of Lee's first application with Bowman on January 13, 1970, and his hiring on September 18, 1970, he would have been employed 248 days, or 35-½ weeks. On the basis of his later employment, he earned an average of $271.66 per week, or a total of $9,643.00 in projected gross earnings for the period. He actually earned $3,518.42 during that period. Thus, he lost a net amount of $6,124.58 by the Company's failure to hire when the application was first filed.

Conclusions.

As seen, the court finds that Lee was harmed by the failure to hire and is entitled to recover $6,124.58 by way of lost wages due to the discrimination involved. Conversely, the court finds that there was no racial discrimination in the failure to secure a transfer from Birmingham to Atlanta in February, 1971, and no racial discrimination in his discharge of March, 1971. As to the latter, the court is asked to assume with no proof whatsoever that Lee's unit was "doctored" by other employees with racial motivation and, more importantly, to assume that the first assumption was caused by racial motivation on the part of management. This the court cannot do. Consequently, no award is made for any period of time subsequent to March 18, 1971. The evidence is clear that Lee was treated the same as any other white driver under similar circumstances and race was no factor in the discharge.

The court is not bound by the arbitration award in any way. The theory adopted in this Circuit is that contractual grievance procedures are independent of all rights under the Act and the two may proceed concurrently without either affecting the other on the merits. *Culpepper* v. *Reynolds Metal Company,* 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303

(5th Cir. 1970). This is especially true where race was given no consideration by the arbitrator. Whatever rights the intervenor presently has, if any, must be governed by the Collective Bargaining Agreement.

Accordingly, the intervenor Lee may recover of defendant Bowman Transportation Company the sum of $6,124.58. No interest is allowed.

IT IS SO ORDERED.

This the 28th day of June, 1972.

/s/ Sidney O. Smith, Jr.
Sidney O. Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NUMBER 15086

HAROLD FRANKS,
Plaintiff

vs.

BOWMAN TRANSPORTATION COMPANY, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA; and, INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA,
Defendants

JOHNNIE LEE,
Plaintiff-Intervenor

ORDER AND DECREE

(Filed June 29, 1972)

In accordance with the findings of the Court, the defendant, BOWMAN TRANSPORTATION COMPANY, and the defendants, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, their officers, agents, employees, servants and all persons in active concert or participation with them, are hereby permanently *enjoined* and *restrained*

from discriminating against any Black applicant or Black employee of the defendant, Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers in violation of Title VII of the Civil Rights Act of 1964.

In particular the defendants collectively are enjoined from implementing any seniority system or Collective Bargaining Agreement which conflicts with the rights of any member of an affected class as defined herein.

AFFECTED CLASSES.

The affected classes are defined by the court as follows:

CLASS 1. All Black employees at the Atlanta Terminal who were hired prior to August 15, 1968.

CLASS 2. All Black employees employed at the Atlanta Terminal in the Maintenance Department prior to May 1, 1970.

CLASS 3. All Black applicants who applied for positions as over-the-road drivers prior to January 1, 1972.

CLASS 4. All Black employees who applied to transfer to over-the-road driver positions prior to January 1, 1972.

ORDERS.

The members of CLASS 1 have all been restricted to jobs in the Tire Shop prior to August 15, 1968, by the racially discriminatory policies of the defendant company. Hereafter any member of the affected class who competes with a non-member in a bid to transfer or be promoted within the company shall be entitled to compete on the basis of company seniority until such date plus any de-

partmental seniority thereafter, rather than departmental seniority only.

The members of CLASS 2 have been restricted to jobs in the Tire Shop and prevented from transferring to the Tractor and Trailer Shops within the Maintenance Department by the racially discriminating policies of the defendant company. All such members shall be notified of the right to bid within the department at the next annual bidding. If bids are lodged and the member is deemed qualified, he shall thereafter be credited with departmental seniority from the date of original employment in all future bidding.

The members of CLASS 3 have been effectively denied employment as over-the-road drivers prior to January 1, 1972. All Black applicants as revealed by the company records prior to such date shall be notified in writing of their right to be considered for employment by the company within 30 days and given 30 days thereafter to indicate their interest. If consideration is requested, then they shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company. Two applicants, Harbor and McLoughlin, shall be considered within 15 days by the company. In any such appplications, race shall not be used by the company as a means of denying employment to any applicant.

The members of CLASS 4, who sought to transfer from a job as "city driver" or elsewhere to road driver shall likewise be afforded priority in consideration for such employment, in chronological order along with the members of CLASS 3.

A copy of this order, or such substituted order as agreed upon by counsel, shall be posted in a conspicuous

place in each department and sub-department of the Defendant, Bowman Transportation Company's Atlanta Terminal and in the office of each terminal and warehouse of the Defendant elsewhere for the period of 60 days. In addition, all bids shall hereafter be posted in each sub-department and shop in the Atlanta Terminal.

IT IS SO ORDERED.

This the 28th day of June, 1972.

/s/ Sidney O. Smith, Jr.
Sidney O. Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NUMBER 15,086

HAROLD FRANKS

VS

BOWMAN TRANSPORTATION COMPANY, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA; and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA

JUDGMENT

(Filed July 14, 1972)

This action came on for trial before the Court, Honorable Sidney O. Smith, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged as follows:

1. Each of the defendants herein is hereby enjoined from discriminating against any job applicant or employee of Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers because of race in violation of 42 U.S.C. 2000e, *et seq.*

2. Each of the defendants is enjoined from implementing a seniority system which would prevent Black employees at Bowman's Atlanta Terminal from trans-

fering to formerly all white job classifications. Black employees hired by the Company before August 15, 1968 shall use company seniority prior to that date and departmental seniority thereafter in bidding on such jobs. Any employee hired into the Maintenance Department prior to May 1, 1970 who obtains a transfer to a formerly all white job within that department shall thereafter have credit for departmental seniority to his original hire date with Bowman Transportation.

3. Black applicants and present employees who sought positions as road drivers before January 1, 1972 shall be notified of their right to priority consideration for such jobs within 30 days.

4. Plaintiff Harold Franks shall take nothing for his back wages claim. Intervenor Johnny Lee shall recover $6,124.58 from defendant Bowman as lost wages resulting from the company's refusal to hire him, but shall recover nothing as a result of the company's discharge of him.

5. Attorneys for plaintiff and intervenor shall recover as attorneys' fees a total of $7,500.00, $6,000.00 of which shall be paid by defendant Bowman and $1,500.00 by the remaining defendants.

Dated at Atlanta, Georgia, this 14th day of July, 1972.

Ben H. Carter
Clerk

By: /s/ Jerry W. Evans
Deputy Clerk